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Carolina Planning

Fall 1996
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Today, a state government must act quickly to meet the challenges created on the other side of the globe.

Can North Carolina resolve potential obstacles and successfuly implement a statewide planning program?

For most planners, zoning is a given.

Few would argue with the assertion that urban crime is out of control in cities across the United States. The less-told story is the crisis in another type of crime: violations of building, environmental and land-use regulations.

From the Editors

We are very pleased with the variety, quality, and practical relevance of the articles in this issue. The issue contains material on several of the major areas of planning, including growth management, zoning, environmental policy, and economic development. In addition to a variety of topics, there are several different styles of articles, from a case study narrative to a paper written from a legal perspective. There is no variation, however, in the level of quality. While each of the articles adds to the knowledge base of planners, five in particular will be of direct benefit to practitioners. Those who deal with code enforcement, new zoning ordinances, North Carolina's Wetland Restoration Program, economic development policy formulation and the law will find useful insights and information in this issue.

Readers will notice changes in the format, some of which are caused by our current financial stress. We now owe the Department of City and Regional Planning almost $2,000. Three factors are responsible for this shortfall: the cost of printing has increased dramatically; we have not raised our subscription rates to our two main subscribers, North Carolina Chapter of the American Plan-ning Association (NCAPA) and the Department of City and Regional Planning Alumni Association (DCRPAA), for several years; and NCAPA's recent reduction in the number of issues purchased has increased the cost per issue. Previously NCAPA ordered an issue for every member; the current policy is to order an issue for institutions.

Readers will notice changes in the format, some of which are caused by our current financial stress.

We have adopted a four-part strategy to deal with this problem. First, we have done everything we can to cut costs, including replacing our glossy cover and eliminating all shading and internal pictures. Second, we are pursuing alternate means for finding money to cover our deficit, including a grant from the graduate student federation (but feel free to send donations). Third, from now on we will charge our two institutional subscribers the actual cost of the issues their members receive. This change should prevent future deficits while ensuring that we do not generate a surplus at the expense of our two largest and most valued subscribers. NCAPA generously increased their budget allocation for *Carolina Planning*, which was not easy given that we make up almost ten percent of their budget. Fourth, we will try to expand the journal's audience, and thus reduce the cost per issue. This will be difficult and time consuming, but we feel that we have a quality product that should reach more planners.

We appreciate the continued interest and support of NCAPA, DCRPAA, and the planning community at large. As always, your comments and suggestions are welcome.

Joe Bamberg
Mark Shelburne

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Wanted: articles, opinion pieces, case studies, news items, book reviews. . .

Carolina Planning is currently accepting articles for the Spring issue. Topics should be relevant to practicing planners in the southeastern United States.

Submission guidelines: Manuscripts should be up to 25 typed, double-spaced pages (approximately 7500 words). Submit two paper copies and one copy on a 3.5" diskette in WordPerfect or ASCII text. All citations should follow the author-date system in the Chicago Manual of Style, with endnotes used for explanatory text (legal articles may use Bluebook format). Tables and graphics should be camera-ready. Please include the author's name, address, telephone number, and email address, along with a 2-3 sentence biographical sketch. *Carolina Planning* reserves the right to edit articles accepted for publication, subject to the author's approval.

Statewide Planning In North Carolina: Experiences from Other States and a Survey of Existing County Planning

Paul David Stancil

Can North Carolina resolve potential obstacles and successfully implement a statewide planning program? This article explores this question by examining three other statewide planning programs and their impetus. The paper then presents a survey of all 100 North Carolina counties to assess the status of planning in the state as seen by practitioners. Finally, the paper recommends a course of action for the state.

Origins of Statewide Planning Efforts

Early efforts

During the Depression era, many states experimented with state goals and plans, although few programs outlived the decade. The suburbanization of the 1950's and 1960's led to a number of state and federal initiatives, such as the Housing Act of 1949. While these programs did provide the framework for planning legislation, there were no truly comprehensive planning initiatives since each effort dealt with a single issue. For example, the state of Hawaii passed legislation in 1961 to protect pineapple-growing regions from development pressures - but the legislation did not address other land use and economic issues (DeGrove 1984:56).

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The "first wave"

According to many planning theorists, federal and state officials did not comprehensively consider the implications of hundreds of local plans and their statewide and regional impacts until the advent of the environmental movement in the late 1960's and early 1970's (DeGrove 1990). The federal laws and regulations that resulted from this movement substantially reordered the roles of federal, state and local government agencies. While these efforts focused on protection of clean water and air, they also paved the way for citizen-based, managed-growth movements in several states and were responsible for the nation's initial statewide comprehensive planning programs (DeGrove 1990).

The first statewide planning program was adopted by Vermont in 1970, but subsequent entries into the field have stolen the show. Florida followed Vermont with a statewide comprehensive planning program in 1972. Florida's program gained national recognition for its strong, centralized state role, and for the importance placed on the concurrent timing between growth and infrastructure needs. In 1973 Oregon created a goal-oriented statewide program that featured special consideration of farm and forest lands, and the designation of areas for urban service provision.

The "second wave"

New statewide planning programs waned along with the environmental movement in the middle to late 1970's. However, interest in statewide programs reawakened in the mid-1980's in a "second wave" of statewide planning initiatives (Sigel 1992).

The "second wave" states shared common

The phrase "statewide comprehensive planning" entered the jargon of government during the last quarter-century. The definition of the term varies from state to state, but statewide comprehensive planning may generally be defined as a program in which a set of statewide plans, goals, and objectives are produced in areas such as land use, economic development, housing, transportation, and other issues. In most cases, statewide comprehensive planning programs also provide a mandate for local governments to create or refine a local comprehensive plan, and/or ensure that the local plan conforms to the state's adopted goals and policies. In some states, local plans are reviewed by regional or state agencies for conformance. The measures of compliance enforcement vary widely, from withholding of state-shared revenues to little enforcement at all.

concerns: high rates of population and economic growth, increasing suburban congestion, and infrastructure constraints. Florida began this phase in 1985 by strengthening its program. Between 1986 and 1992 New Jersey, Vermont (a follow-up program), Maine, Rhode Island, Georgia, Washington and Maryland created programs of their own.

Over the past quarter-century, a total of 33 states have adopted or considered programs to link state goals, policies and plans with those of local governments (Cobb 1994). As of 1994 twenty four states had some form of mandatory planning program. However, only nine (Vermont, Florida, Oregon, New Jersey, Maine, Rhode Island, Georgia, Washington and Maryland) of those programs could truly be defined as having a growth management function (Sigel 1992).

Case Studies from Other States

Florida (1972 to present)

It is not difficult to see why Florida was a likely candidate for state involvement in comprehensive planning. In 1950 the state contained 3 million residents, and coastal development was localized and sporadic. By 1970, the population had increased to 6.8 million, with a significant shift in population and development to coastal areas, threatening sensitive ecosystems. Destruction of wetlands and threats to drinking water supplies fueled the environmental movement in the state. A task force charged with examining the state's carrying capacity called for management of water resources and conservation of special natural sites and critical environmentally sensitive lands. The legislature passed legislation to this effect in 1972 (DeGrove 1984:103-105).

A companion law enacted in 1975 required every local government to adopt plans approved by the State Department of Community Affairs. The Local Government Comprehensive Planning Act mandated that local plans be prepared by July 1, 1976. All cities were able to comply with the deadline (five allowed the county to assume responsibility). However, only 11 of 67 counties had submitted plans by 1978 (DeGrove 1984:162).

While the 1972 and 1975 legislation addressed many concerns, the laws did not adequately account for demands on the state's infrastructure, particularly roads, public water and sewer systems, and recreation facilities. The principal problem was a lack of funding for infrastructure improvements to go along with the provisions of state-mandated comprehensive plans, a concern cited by many local governments across the nation.

Florida Atlantic/International University professor John DeGrove, one of the leaders of the Florida effort, summed up the problem:

> During the 1970s, Florida still dwelled in a kind of 'fools paradise', in which it believed that growth automatically paid for itself, and that sooner or later new growth would cause all the needed infrastructure to be put in place to support the impacts of growth. It was not until that notion was put aside in the 1980s that Florida began to face its growth management problems. [DeGrove 1990]

In 1985, the legislature adopted the State Comprehensive Planning Act of 1985 and the Omnibus Growth Management Act. These bills put "teeth" in the previous programs by requiring integrated and mandatory planning at the state, regional and local levels and by creating a set of requirements that addressed the quality of the plans and the provision of a "reasonable" means of implementation.

During the 1970's, Florida still dwelled in a kind of 'fools paradise,' in which it believed that growth automatically paid for itself.

The linchpins of this program are the twin doctrines of "consistency" and "concurrency." The consistency provision required each of the state's 11 regional councils to adopt comprehensive regional plans consistent with state policies. Additionally, all local governments were to submit their plans to the state Department of Community Affairs (DCA) to be evaluated against the state plan.

The concurrency provision has garnered the lion's share of attention. The concept of requiring concurrent provision of infrastructure with new development dates to the early 1970's. The town of Ramapo, New York enacted a local ordinance that required a review of services and facilities before land subdivision could occur. The city of Petaluma, California, adopted a local law with a building permit cap designed to evaluate impacts based on existing plans.

Florida's concurrency provision builds on these concepts. Once the local plans are established, it is illegal for local governments to issue building permits if adequate infrastructure will not be in place by the time the development is completed (Porter and Watson 1993).

Greg Burke, a planner with the DCA Bureau of State Planning in Tallahassee, notes that the process has come a long way from his perspective at the state level:

> Initially, the whole process with the local governments was rather antagonistic. It's been a mixed bag in terms of the types of plans we've seen submitted. But the program has brought under one blanket different issues like growth, environment and infrastructure. [Concurrency provisions] have been a dilemma at times, but only for transportation issues with our backlog of road construction projects. Overall, I think our program has been beneficial - it's changed the way people think about the way their community grows. [Burke 1996]

The Florida story does not end with the 1985 legislation. The role of regional power and the ability of state agencies to handle the workload of plans was part of the fine-tuning recommended by a 1992 Environmental Land Management Study (ELMS) commissioned by Governor Lawton Chiles. According to DeGrove, this highly diverse committee "miraculously" reached unanimity in recommending revisions. The study recommends updating the state plan, producing a complementary strategic plan for growth, and "defanging the regional councils" by restructuring their function as "planning and coordination rather than regulation" (DeGrove 1990).

In a recent conversation, DeGrove indicated that the "miraculous" consensus from ELMS has translated into new legislation implementing many

State Planning Programs

	MD 1992	WA 1990	GA 1989	RI 1988	ME 1988	NJ 1986	OR 1973	FL 1972	VT 1970
Requires:									
state plan			X	X		X	X	X	X
regional plan			X					X	X
local plan	X	X	X	X	X		X	X	X
Plans must be approved by the state		X		X		X	X	X	
Requires concurrent infrastructure		X						X	
State funding dependant on participation		X	X	X	X	X	X	X	X

of the findings, all of which have been approved by the state legislature.

Oregon (1973 to present)

With a reputation as an environmentally conscious state, Oregon has long been noted for its interest in the protection of rural character and quality of life. This interest has prompted some to label it a "no-growth" state.

There are two potential catalysts for Oregon's program: the influx of California transplants seeking refuge from that state's urban transportation problems (Cobb 1994), and the Clean Water and Clean Air Acts. In 1973, a citizens' group lobbied the state legislature to focus the state's efforts in this area, and the state responded by enacting the Comprehensive Land Use Planning Coordination Act.

Goal-setting is a prominent feature of the Oregon program. Some of the program's goals include:

- protection of the state's quality of life (livability),
- protection of agricultural activities and managed forest land as open space,
- provision of adequate affordable housing,
- energy conservation, and
- broad-based efforts to control air pollution and traffic congestion.

The act created the Land Conservation and Development Commission (LCDC) and required each city and county to adopt a land use plan and implement the plan with zoning and subdivision regulations. The LCDC was charged with assisting local governments in the development of the plans and reviewing the plans for consistency with state goals. The plans are supplemented with inventories of existing land uses and are updated every two to seven years.

The state's goals called for the inclusion of basic elements such as management implementation measures on building codes, sign ordinances and zoning. The act also required that the plans cover public facilities and annexation and include a capital improvements plan.

Perhaps the most noteworthy element of the Oregon program was the designation of Urban Growth Boundaries (UGBs), an urbanization boundary concept later borrowed by other governments (including some in North Carolina). Municipalities protect rural character and farming by providing incentives and adequate infrastructure for higher densities within the UGBs (Sigel 1992). Tom Harry is Associate Planning Director of Washington County, Oregon, a fast-growing county in the Portland metropolitan area. With the growth pressures in Washington County, Harry sees the need for the urban services boundary and describes it as "the best part of the program" (Harry 1996).

The Oregon program is arguably the most successful in the nation. According to some, the only real problem with the program is that it was untested in the first fifteen years. During that period Oregon had a relatively stable economy and a slow development market; conditions changed markedly in 1990s Now some urban growth areas are running out of room because of an unwillingness to support very high densities (Sigel 1992). These jurisdictions may be faced with drawing a new urban boundary in the next several years.

Georgia (1989 to present)

In Georgia the initial push for statewide planning came from concern about both resource protection and regional economic development.

Unlike Florida and Oregon, the Georgia legislature remained somewhat skeptical of statewide planning, leaving the Governor to provide leadership (Youngquist 1990). In 1987 Governor Joe Frank Harris appointed the Growth Strategies Commission, whose recommendations led the legislature to adopt the Georgia Coordinated Planning Act of 1989. The act required all cities and counties to adopt

One important difference from other statewide programs is that the Governor's Development Council will develop the state plan from the regional plans.

comprehensive land use plans, implement zoning, and create minimum protection criteria for wetlands, aquifer recharge areas and watersheds. The act also created two new state agencies: the Governor's Development Council and the Department of Community Affairs (DCA).

The Governor's Development Council was charged with coordinating long-range state agency planning, including the construction and location of public facilities. DCA is charged with overseeing local and regional planning, and providing staff assistance where needed. Local plans must include community goals, an inventory of the existing situation, and an implementation strategy. The plans must also address six elements: population, economic development, natural and historic resources, community facilities, housing, and land use. However, the state has little authority in how these elements are addressed.

The sense of regionalism in Georgia is strong, with great diversity between the urban areas of Atlanta and Savannah and the rural areas of northwest and southwest Georgia. Because of this historic regionalism, the state act makes regions, through Regional Development Centers (RDCs), the primary level of planning. The RDCs review all local plans and provide technical assistance. The regional plans are prepared based on the submitted local plans. The RDCs also compile a regional database, review local actions of regional impact, and mediate disputes or conflicts among different jurisdictions.

One important difference from other statewide programs is that the Governor's Development Council will develop the state plan from the regional plans. While the state may eventually withhold infrastructure financing from local or regional governments that do not meet the new requirements, the state has little final say in the elements of local and regional plans.

Because the Georgia program has only been in effect since 1989, it is difficult to judge the success of its regional, bottom-up approach. However, the program has won praise for dramatically increasing the number of local governments involved in planning. As of December 1994, over 575 local plans had been submitted to DCA for approval. In addition, the program continues to be supported by both of Georgia's local government associations, lending further credibility to the process (Youngquist 1995).

Jim Youngquist, Assistant Director of the Institute for Community and Area Development at the University of Georgia, has watched the Georgia plan unfold and believes the program has been successful in involving local governments in a coordinated planning process. However, there are concerns about the relative success of the Regional Development Centers. The lack of private sector members on RDC boards and the independent nature of some local governments has made the RDC's role more difficult. In addition, the "going through the motions" approach of some local governments - viewing plans only as a vehicle to qualify for state funding - has posed problems in creating a plan that can be sustained at the next level (Youngquist 1995).

This view is confirmed by Lee Carmon, AICP, Director of Local Planning for the Northeast Georgia RDC. "Joint plans have been beneficial for smaller jurisdictions that don't have their own staff. But only about 20% of our counties are using the plans that have been created. We've had success stories, but some have been frustrating because of failure to implement the plans." Carmon cites the lack of implementation as the program's most significant drawback:

> Overall the program has been good. The local governments would never have done plans if not for the statewide program. But if I could change the program, I'd do three things. First and most important, I'd require implementation of the plans. Next, we need to develop different standards for different size jurisdictions. Finally, we need more information on protection of resources through environmental standards. [Carmon 1996]

North Carolina in 1994: A Survey of Counties

In addition to the experiences of other states, information about the current status of local planning can provide valuable insight into the scale and type of statewide program that would be most effective in North Carolina. To this end the article presents and analyzes the results of a survey on the level of planning and attitudes toward a possible statewide effort among the state's 100 counties.

Survey Methodology

The survey of all 100 counties was conducted from January to May, 1994. If the county had a Planning Director, he or she was the call target. In other cases, managers, assistant managers, county

clerks—and in a few cases, elected officials—were respondents. All 100 counties responded to the survey.

Individual responses to questions about local attitudes toward planning and the possibility of a statewide planning program have been kept confidential to allow for candid appraisal of public and elected board opinions.

Analysis of Survey Results

Most counties do employ some type of planning staff; almost two-thirds (64%) of the 100 counties have at least a Planning Director. In addition, most counties have also adopted some type of county plan. Seventy percent of North Carolina counties have a basic land use plan, but less than one in five (18%) have what could be termed a multiple-element com-prehensive plan. The majority of the counties with full comprehensive plans are located in the Piedmont, although there are counties with comprehensive plans along the coast and in some mountain areas.

As of 1994 none of these plans were over 25 years old, with the oldest dating from 1971. Many counties have plans which were made prior to 1971, but have updated or rewritten versions currently in place. The survey also revealed that 28 of the 70 counties with plans (40%) have adopted updates to their plan since 1990, and another 11 updates are in progress.

Just over one county in three (36%) had countywide zoning in 1994, and most of these counties are located in the state's three metropolitan areas of Charlotte, the Triad or the Triangle. Only 41% of the counties have zoning in place in over half of their jurisdiction, and almost one-half of the counties (47%) apply zoning in less than 25% of their jurisdiction. Over three-quarters (76%) regulate land subdivision activity.

However, it should be noted that while many North Carolina counties have zoning, there is a wide disparity in the degree which the tool enforces a local plan. Only 17% of the counties responded that zoning districts must be consistent with the plan. Some respondents indicated that the plan is more likely to be amended on the basis of a rezoning request rather than the reverse, possibly indicating that a large number of county plans may be "shelf documents" with little impact on land use decisions.

Respondents were asked to rank citizen attitudes toward planning issues in general. Eighty percent felt that their county citizens are either slightly negative or ambivalent toward land use planning policies, while 19% ranked their constituencies as somewhat positive to positive in their response to planning programs.

When asked "How would current elected officials in your county likely react to a state program which offered assistance in local economic development and planning, and coordinated counties, regions and the state," 43% of administrators felt that their elected officials would respond positively. Another 41% projected a wait-and-see response from elected officials, while only 15% expected a negative response.

Seventeen administrators added the same thought: adequate funding by the state for such a program would play a key role in eliciting a positive response from elected officials.

Adequate funding by the state for such a program would play a key role in eliciting a positive response from elected officials.

Administrators themselves were even more positive about a potential statewide program. Asked how they would respond to the same question, 79% responded positively, with only four percent negative.

Regional Analysis of Survey Results

Planning Directors are more common in the Piedmont (85% of counties) than in the other two regions (approximately one-half of the counties). Not surprisingly, this pattern applies to plans as well. Almost one-half of the mountain counties (43%) and almost one in four eastern counties (23%) have no plan at all, whereas in the Piedmont 91% of counties have a plan of some kind.

The pattern does not extend to comprehensive plans; 22% of mountain counties, 29% in the Piedmont and 16% of counties in the east have comprehensive plans. The fact that fewer eastern counties have taken the step to comprehensive plans is noteworthy, since 20 of the 43 counties in this region are required by the Coastal Area Management Act (CAMA) to have a land use plan. This may indicate that mandating land use plans in the coastal

region has served to discourage plans of a more comprehensive nature.

A look at these 20 counties provides more evidence that the state mandate has not encouraged planning on a larger scale. While expected positive responses from elected officials ranged from 42% to 52% in the three regions, the coastal counties show only a 25% expected positive response. One in five of those surveyed expected a negative response, while over half (55%) expected a wait-and-see approach. Compared to the rest of the state, the response from administrators was lukewarm; almost one in three (30%) were noncommittal or negative toward the possibility of a statewide program. Despite the existence of land use plans, only 60% of CAMA counties have a zoning ordinance in place, and less than half (45%) were active with their council of government.

Conventional wisdom would predict that mountain counties are likely to be opposed to planning initiatives, and would locate the relative strength of local planning in the Piedmont (Holman, 1991). Surprisingly, the strongest support of the three regions is found in the mountains, where respondents in 52% of the counties expected positive feedback from elected officials in 1994. Conversely, the strongest negative response is found in the Piedmont counties, where 21% expected that elected officials might not support a statewide program. The Piedmont, with its longer experience with local planning, had the lowest "wait-and-see" response at 25%, indicating that perhaps experience with local planning programs has provided a clearer perspective.

The Partnership for Quality Growth

On May 3, 1991, the North Carolina General Assembly adopted Joint Resolution 1157, authorizing the Statewide Comprehensive Planning Committee (SCPC) "to study and develop a state-mandated comprehensive planning program." In its deliberations, the SCPC received presentations on other states' programs and held several regional meetings and public hearings across the state. On December 15, 1992, the Committee completed its initial work and adopted a draft bill to create a blue-ribbon task force called the Partnership for Quality Growth. The task force would be composed of equal appointments made by the House, Senate and Governor and would be charged with identifying state goals and needs and addressing the specifics of a growth management program. The proposed bill expanded the focus to include economic development and identified a number of issues:

1. The need for local governments to have the ability to plan according to their own needs in a statewide process.

2. Financial and technical assistance and incentives to plan.

3. Coordination and oversight.

4. Educational forums to enhance the public's understanding of the need for statewide planning.

5. Caution about increasing levels of bureaucracy.

6. The need to complete a balanced and thorough study of statewide planning.

However, the very formation of the Partnership is very much in question as a result of political changes since 1991. Most recently, the defeat of SCPC co-chairman J.K. Sherron in the 1996 primary left the effort without a legislative leader, although former House co-chair Tim Hardaway will return to the General Assembly and may pick up the issue. The General Assembly failed to enact the bill in 1993, remanding it back for further research that did not occur. In the 1994 session, a General Assembly with a substantial number of new members lumped the issue into the "State and Local Government Fiscal Relations and Trends Study Commission" as one of 13 issues for research.

Charting a Course for North Carolina

The lessons from the experiences of other states and information from the survey of counties point to several recommendations as North Carolina considers statewide planning.

Provide Adequate Funding and Staff

The Partnership for Quality Growth will need to address a variety of issues left by the Statewide Comprehensive Planning Committee. A lack of staff resources clearly made their work more difficult. The Legislature should provide at least two full-time staff persons and enlist academic experts on a contract basis.

Inventory the Status of Planning in Cities and Counties

A survey of the status of city and town planning may reveal a significant disparity between the planning resources of the state's cities and counties. In addition, a follow-up survey of the state's counties may prove instructive to assess political changes in the last two years.

Provide Public Education and Conflict Resolution

One of the most acclaimed aspects of the Georgia approach has been the role of the Regional Development Councils as mediators between feuding jurisdictions. North Carolina Councils of Government could perform a similar role. In addition, the public education component was a key part of the process outlined by the Statewide Comprehensive Planning Committee. Educating local elected officials of the mission and mutual benefits of the effort should be the first phase of the program.

Balance Resource Protection and Economic Development Goals

The North Carolina *Economic Development Strategy*, created in 1994, offers an excellent opportunity to engage the private sector in dialogue about a truly comprehensive program. An integrated, coordinated approach that balances economic development goals with sustainable development and resource protection would enhance the chance for a successful program.

Strengthen and Utilize the Regional Councils of Government

Much can be learned by examining all of the statewide planning programs. Because of its dispersed settlement patterns, diverse regions and historical skepticism of planning, the Georgia approach appears to be the best model for a program in North Carolina. North Carolina currently has 18 regional councils of government (COG's) that serve as the focus for regional cooperation. However, membership in many COG's has been fluid, with some local governments unwilling to participate consistently. Over one-third (38%) of North Carolina counties do not consider themselves active with their regional Council of Government. If a modified Georgia model is to work in North Carolina, mandatory participation in the COG's may be needed to ensure that interjurisdictional concerns are addressed.

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Property Rights Legislation: North Carolina's Hog Farm Problem and the Forgotten Rights of the Land Owners Downstream

Jennifer L. Davis

> From the air, you can see the dead creek long before you see what killed it. For seven miles, the water runs as green as lime Jell-O, and the trees on either side are dead. Follow the trail upstream, and there's the suspect: a row of flat gray hog houses owned by J & H Milling. Near the water's edge is the spot where twin pipes pumped the raw sewage of 12,000 hogs directly into Middle Swamp [a Neuse River tributary]. The pumping went on for 14 years until the creek suffocated in waist-deep sludge.[1]

North Carolina has a hog farm problem. As the hog farm industry grows in North Carolina,[2] so do the environmental disasters that accompany it. This paper will examine the environmental dangers that the hog farm industry has posed to North Carolina's rivers and streams and the failure of the state to adequately prevent those harms from occurring.[3] Then, this paper will address general legal protections against regulation by state and federal legislatures, including a discussion of the U.S. Supreme Court's regulatory takings analysis and the increasing popularity of "takings bills" in state and federal legislatures.[4] Specifically, this paper will review a "takings bill" being considered by the North Carolina General Assembly that would compensate a private property owner for any diminution in value of her land caused by a state regulation.[5] At the same time, the Assembly was considering more stringent regulation of hog farms. Finally, this paper will argue that a takings bill in North Carolina would not only detrimentally affect the extent to which the state could regulate hog farms that pollute the state's rivers and streams, but would also be unfair to the landowners who live downstream from those hog farmers and who are denied beneficial use of their land because of the state's failure to regulate.[6]

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The Problem

Waste Spills, Intentional Dumping, and Fish Kills

Since 1989, the swine production industry has quadrupled in North Carolina, making North Carolina the nation's second largest hog producer after Iowa.[7] In June of 1995, an overfilled sewage lagoon and a rain-soaked dike at Oceanview Farm Ltd., an Onslow County hog farm, caused a dam to break, dumping 22 million gallons of pure hog waste into the New River.[8] The North Carolina Department of Environment, Health, and Natural Resources placed blame for the spill squarely on the shoulders of the farm operators. The operators had failed to plant enough crops to take up the waste the farm generated, had let the liquid level in the 25-million gallon waste lagoon rise to the point of overflowing, and had installed irrigation pipes in the side of the lagoon (the eventual site of the breach that caused the spill) without consulting any engineers.[9] After the spill, a systematic survey of hog farm operations in North Carolina ordered by Governor Jim Hunt found "60 farmers who were deliberately dumping animal waste into streams through pipes or ditches . . . [and] fifty other farms . . . discharging sewage inadvertently through leaks or overflows from waste lagoons."[10] One commentator charged that the spills were "the predictable results of an impotent regulatory and enforcement process . . . [and] the contemptuous indifference with which our state government has treated its citizens and environment in the face of

explosive hog-farm development."[11]

These recent waste spills into North Carolina rivers and swamps have caused fish to die by the millions.[12] Rivers like the Neuse and Cape Fear have become overloaded with nitrogen and phosphorus, elements that cause a cycle of algae infestation and oxygen depletion during which fish suffocate.[13]

> Each day, trainloads of nutrients arrive from the Midwest in the form of feed grains for livestock. The corn and soybeans are fed to pigs and poultry, and a little of the nitrogen and phosphorus is absorbed into the animals bodies. The bulk of it is excreted as animal waste. In the swine industry alone, the 8 million hogs in the state's eastern counties produce, conservatively, 10 billion pounds of manure a year, which includes about 70 million pounds of nitrogen.[14]

When this animal manure spills into rivers it joins nitrogen already present in the rivers from ground and ditch seepage of animal waste. Additionally, ammonia gas adds nitrogen in rivers and streams as it rises into the air from hog barns and lagoons and returns to the earth in rainfall.[15] The nitrogen and phosphorus cause inordinate amounts of algae to grow on river surfaces. When the algae dies, it sinks to the bottom of the river, where it is decomposed by bacteria in a process that consumes oxygen. "Unless the water is mixed or recirculated somehow, the oxygen eventually will run out," causing massive fish kills.[16] One discouraged environmentalist recently jested that he had "seen catfish crawling out of the water" when commenting on millions of dead eels, bream, bass and other fish that lined the Cape Fear River last summer.[17]

North Carolina's Regulation of Hog Farms

North Carolina has relied heavily over the past several years on a voluntary approach to preventing the flood of waste into North Carolina's rivers. The North Carolina Agriculture Cost-Share Program was begun in the mid-1980's to assist farmers in paying for projects that prevent waste from entering North Carolina's streams. "Growers may be reimbursed up to $15,000 over three years for projects such as grass-strip borders around fields or better animal-waste disposal systems."[18] However, the state can document no improvements in water quality from the $56 million it has spent on the program. Also, many critics of the volunteer system complain about conflicts of interest on the local boards that administer the funds and frequently award large sums of money to themselves.[19]

Prior to last summer's spills, swine industry owners had blunted almost every effort in the North Carolina General Assembly to better regulate hog farms.[20] Even North Carolina's nuisance laws make it extremely difficult for private property owners to maintain a nuisance suit against hog farmers.[21] Early last summer, however, it appeared that the tide was turning. Governor Hunt issued strong statements to state swine farmers that they should "shape up or ship out."[22] Not only was the Governor instrumental in getting the North Carolina Division of Environmental Management to strengthen its plans for reducing pollution in the Neuse river, but he was also the impetus behind a Blue Ribbon Commission on Agricultural Waste whose findings are due before next month's regular session of the General Assembly.[23] The group is considering the results of several studies it commissioned and is reviewing stricter regulation proposals for the swine industry, including strict licensing procedures, mandatory testing of lagoons and lagoon liners, emergency spillways in all lagoons, and prohibitions on hog farming in sensitive watersheds.[24] The commitment Government Hunt and many North Carolina legislators have shown to regulating hog farms in order to promote the environmental welfare of North Carolina's rivers, streams, and drinking water is a decided shift away from North Carolina's former public policy.[25] However, if the regulations that arise from the upcoming full session of the General Assembly, sparked by the findings of the Blue Ribbon Commission, are stringent enough, many hog farmers will likely complain that the state government is interfering with their property rights and their distinct investment-backed expectations.

Likely Failure in the Future to Regulate Hog Farms

As one critic has noted "it would be difficult to imagine a regulation of hog farms that could be so stringent as to affect a takings of property,"[26] compensable under the Supreme Court's interpretation of the Fifth Amendment of the United States Constitution. However, in the past decade courts and legislatures have slowly been moving towards greater protection of private property rights in the face of a growing regulatory state.[27] This trend could have an adverse effect on the extent to which the North Carolina General Assembly chooses to

regulate one of the state's biggest industries.[28] Already, the Blue Ribbon Commission has been criticized for moving too slowly and many critics fear the Commission's proposals will not be stringent enough.[29] Activists question why no environmentalists were chosen to serve on the Blue Ribbon Commission which will propose new regulations for the hog farm industry. In fact, five of the 18 members on the Commission currently raise hogs, while eight others have ties to the swine industry.[30] In response to criticisms regarding the failure of the Commission to include environmentalists, Co-Chairman of the Commission U.S. Representative Tim Valentine said, "What the heck—I think of myself as an environmentalist."[31]

Legal Protection Against Regulation

Many critics note the existence of a changing and reactionary judicial and legislative commitment to the protection of private property rights in response to growing governmental regulation of environmental dangers like those posed by North Carolina's hog farm industry. As one commentator noted, "[o]ver the last two decades the growth of this country's environmental regulatory regime has been nothing short of astonishing. It accounts for many of the regulations covering almost every aspect of our lives, which grow by 200 pages each day in the Federal Register."[32] Horror stories by private property owners whose property has been devalued or condemned by environmental regulations abound in the rhetoric of the heated debate over the contradictory interests of environmentalists and property owners.[33] Representative Billy Tauzin of Louisiana, in a vehement speech on the "overzealousness" of regulatory officials, recently stated: "Something is fundamentally wrong in our country when a rat's home is more important than an American's home. At the rate we're going, it won't be long before we're forced to add people to the Endangered Species List."[34] Even federal judges have entered the public debate. U.S. Claims Court Chief Judge Loren Smith recently stated publicly that "the takings clause was meant to provide a check on government regulatory programs."[35] Recent victories for private property owners at the U.S. Supreme Court in Fifth Amendment regulatory takings claims and the growing popularity of legislative protections of private property owners have combined to make for "heady times for the champions of private property."[36]

Regulatory Takings Law and the Fifth Amendment

The Fifth Amendment of the U.S. Constitution states: "nor shall private property be taken for public use without just compensation."[37] Since 1922, this clause has been interpreted to apply to certain regulatory actions of the government that go "too far."[38] In *Pennsylvania Coal v. Mahon*, the United States Supreme Court recognized that a government restriction or regulation could deny an owner of distinct property rights such that the government would be required to compensate the owner for "inverse condemnation" or a "regulatory taking." Thus, the Court has expressed that the Takings Clause serves "to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[39] Since this recognition, "the rivers of ink spilled and forests of trees felled in the effort to understand the field of regulatory takings [has become] legendary."[40]

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The Supreme Court has chosen an essentially *ad hoc* procedure to determine if a regulatory taking has occurred. Historically, the Court has concerned itself with three factors, which it delineated in *Penn Central Transportation Co. v. New York City*,[41] in reviewing a regulatory takings claim: (1) the economic impact of the regulation on the property owner, (2) the regulation's effect on distinct investment-backed expectations, and (3) the character of the governmental action.[42] If a government regulation interferes too greatly with the economic value of the property or with the expectations the owner had in purchasing the property, or if the government's action significantly interferes with an owner's rights to use

his property, then the Court is more likely to find that the government must compensate the owner.[43]

The Court has also created two discrete categories of regulatory takings claims that do not require an analysis of the three factors delineated in *Penn Central*. In *Loretto v. Teleprompter Manhattan CATV Corporation*,[44] the Court held that "permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine."[45] Thus, if a government action causes an object, in this case a cable wire, to be permanently affixed to an owners land, then compensation is required regardless of whether a diminution in value of the property has occurred and regardless of the degree to which the property can reasonably be considered to be "occupied."[46] Similarly, when a regulation deprives an owner of "all economically beneficial or productive use" of her property, then the Court has held that a *per se* government takings has occurred.[47] In *Lucas v. South Carolina Coastal Council*, the Court held that the government had taken two beachfront parcels of land when it enacted a conservation statute that prohibited building on the beach.[48] "It appears, however, that in instances of less than total deprivation of value, the multi-factored analysis described in *Penn Central* still guides the courts."[49] These developments, coupled with U.S. Supreme Court decisions like *Dolan v. City of Tigard*[50] and *Nollan v. California*,[51] have given champions of private property rights several recent victories to celebrate.

Federal and State "Takings Bills"

The election of Republican majorities in both the Senate and the House of Representatives, "impelled in part by public promises by party leaders to live up to the terms of the 'Contract with America,' has dramatically increased the chances for congressional passage of legislation protecting landowners from the economic effects of a wide range of environmental and land-use regulations."[52] Additionally, protective legislation proposals have become increasingly popular in state legislatures where agricultural lobbyists have been more successful at convincing state legislators of the federal "regulatory excess."[53] Several states have passed bills requiring state governments to assess the environmental impact of their actions or to compensate land owners when a regulation diminishes the value of private land by a certain specified percentage of its value.[54] For example, at the same time North Carolina lawmakers are considering more stringent regulation of hog farming operations, they are also considering a "Property Rights Act" which, in the words of the act, will "provide for payment of compensation to an owner when land-use regulation by a governmental entity causes an economic impact resulting in *any* diminution in the total value of the owner's land."[55] This proposed act, which is still in committee, is modeled after several similar state bills or proposed bills that have become increasingly popular over the past few years.[56]

> If "any diminution in value" of private property would trigger mandated governmental compensation, the *existing* statutory set-back requirements for hog farm lagoons and barns could clear out the state treasury in an afternoon.

Property Rights Bills usually come in one of two forms. They are either "assessment bills" or "compensation bills."[57] Assessment bills are those bills which require "government to assess takings implications (or property rights implications) of its proposed actions in a formal process."[58] In the past three years, more than sixty assessment bills have been introduced at the state level, often modeled after President Reagan's Executive Order No. 12,630 requiring federal agencies to perform a takings analysis before acting.[59] Six states have enacted such provisions.[60] In support of these bills, many proponents argue that assessment of takings implications may lessen the extent to which state and federal regulations encroach on private property rights by requiring governmental agencies to "look before they leap."[61] However, critics of the acts argue that

assessment is "just another layer of red tape to thwart agencies from regulating, no matter how great the public need."[62]

Compensation bills, on the other hand, are those bills that prescribe a "statutory standard for compensating property owners once agency action is taken" that causes a diminution in private property values.[63] Five compensation bills have been successfully enacted at the state level.[64] out of the fifteen proposed state compensation bills.[65] Similarly, the 104th Congress is considering a compensation bill at the federal level as part of the Contract With America.[66] These bills usually define a "takings" as an act which causes private property to decrease in value by a certain percentage, although some bills have used more flexible standards.[67] Proponents of these bills argue that constitutional remedies for takings are inadequate because pursuing a claim against the government requires too much time and money and takings precedent is extremely unclear.[68] Thus, "a single, unvarying value-loss threshold as a compensation trigger would afford greater certainty to both landowner and government agency."[69] Detractors from this legislation argue that the "reality is that the state simply cannot afford to pay off every landowner for every land-use decision," and that compensation bills are arbitrary in that they disparage the rights of property owners who just miss the threshold percentage to trigger compensation.[70]

Applications of a Takings Bills in North Carolina

On a theoretical level, it is understandable that takings bills would have some popular support, especially when the debate is couched in terms of the competing interests of animals and human property owners. But a takings bill in North Carolina could have several detrimental effects on the state's ability to regulate its environment and on the rights of property owners who live near or downstream from hog farmers. This section will demonstrate why passage of the proposed Property Rights Act in North Carolina is undesirable. Such a bill would tie the hands of state legislators who wish to prevent hog farmers from further damaging our state's ecosystem. Additionally, the bill would prevent the state from protecting landowners who are harmed by the acts of hog farmers by not providing a remedy to property owners when the state's *failure* to regulate has caused a diminution in value of their property and by using valuation techniques that allow hog farmers to spread the cost of their operations to downstream property owners.

The Effect of Takings Bills on Needed Regulation of the States' Environment

In the earliest regulatory takings case before the Supreme Court, Justice Holmes argued that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every . . . change in the general law."[71] In the case of takings bills, it is clear that government could "hardly go on" regulating the environment if it were obligated to compensate owners for all diminutions in value of land caused by a regulation. As one critic has argued, "[i]f the government labored under so severe an obligation, there would be, to say the least, much less regulation."[72] A compensation bill like the one being proposed in North Carolina would leave state government officials with one of two options: bankruptcy or minimal regulation of the state's environment. If "any diminution in value" of private property would trigger mandated governmental compensation, the *existing* statutory set-back requirements for hog farm lagoons and barns[73] could clear out the state treasury in an afternoon. Caught up in the rhetoric of "protecting property owners" from "arrogant bureaucratic environmentalists," supporters of the Property Rights Act have failed to consider the practical implications of limiting the state's ability to protect its environment. The passage of such an Act would leave the quality of our state's rivers and streams in great peril.

No Remedy for Diminution in Value for Failure to Regulate

Furthermore, supporters of the Act have forgotten about the property rights of the owners who live downstream from hog farm operators. As Professor Joseph Sax recently noted:

> It has never been the law that one owns property without any obligation toward the public. . . . It is the obligation of every owner to try to find ways to accommodate the needs, principles and goals of the community in which he or she lives. It is the property owner's obligation to try to adapt uses so that economic benefits to the individual owner flow from those uses, and at the same time the benefits of the community rich in amenities

> as well as public health and safety can be maintained.[74]

North Carolina's proposed takings bill does not allow property owners to demand compensation for government's *failure* to regulate when that failure has deprived them of any enjoyable use of their land. In that respect, North Carolina's proposed Property Rights Act protects the rights of some property owners (those whose property is being regulated) at the expense of others (those whose property is harmed by the state's failure to regulate).

Clearly, the Act forgets that property law does more than "merely protect men [sic] in their possessions."[75] Imagine a society in which owners of property were not required to accommodate the needs of the community. It would be a society with no zoning laws, no nuisance laws, no limitations on water and air pollution, and no protection of endangered species. This is the type of society that takings bills envision, and practically would create, in the name of protecting a person's right to possess property. This vision departs from our most traditional understandings of the definition of property. As one critic has explained, "property, in the historical view, did not represent the autonomous sphere of the individual to be asserted against the collective; rather, it embodied and reflected the inherent tension between the individual and the collective."[76] This tension cannot be resolved through simplistic, bright-line legislation. The proper resolution of the tension must come after a careful weighing of the rights of individual owners and the rights of the community to use and enjoy land.

Spreading the Costs to Those Already Harmed

The manner in which compensation would be triggered by the proposed Act also fails to consider "downstream property owners." The Act would require the state to compensate a landowner (in this case a hog farm operator) when "an *appraisal* . . . indicates any diminution of the total value of the property" (the hog farm).[77] A "market value" appraisal of a parcel of land, however, would not take into account the costs of harms from unregulated use of a particular parcel of land that would be spread to other land owners. By failing to incorporate these externalities into the "market value," the Act would compensate hog farm operators for harming the property values of other landowners. Hog farmers would be free to pass the cost of operating an agricultural operation in a manner that does not harm other landowners to the very owners who are being harmed under current practices.

A "market value" appraisal of a parcel of land would not take into account the costs of harms from unregulated use of a particular parcel of land that would be spread to other land owners.

Conclusions

Takings bills are impractical and unfair. The North Carolina General Assembly, if it were to pass such legislation, would fail to balance the inherent tensions of the rights of property owners and the rights of the community as a whole. The proper bodies to perform this balancing of interests are the courts. While it is true that the current judicial procedure for resolving regulatory takings claims is unpredictable:

> [u]npredictability may be desirable in a society in which the governmental distribution of gain and loss in property values requires controversial policy choices. Courts may recognize that the political process is the preferred method for making these policy decisions. . . . [Current judicial theories of takings law] allow a court to invalidate land-use regulations it considers unacceptable and to uphold these regulations when it is willing to accept the political policy decisions. These political necessities suggest that a reformation of taking-clause theory to provide more predictability may be unwise.[78]

Reformation of takings law is especially unwise when takings bills foster predictability by so arbitrarily making controversial policy decisions that only favor certain property owners at the expense of

the rights of others. North Carolina's proposed Property Rights Act is one more shameful way that our state's public policy would openly favor agricultural interests at the expense of the state's environment.

Editors' Note

This article was written in April, 1995. Late in April, the Property Rights Act failed to pass the General Assembly. However, it is likely that new takings bills will be introduced in the 1997 Session.

Endnotes

[1] Joby Warrick, *A Bumper Crop of Waste*, RALEIGH. NEWS & OBSERV., Mar. 5, 1996, at A-1.

[2] The hog farm industry in North Carolina has quadrupled in size in the past five years. *Id.* at 6A; see *infra* note 6 (noting this phenomenon).

[3] See *infra* notes 7-31 and accompanying text.

[4] See *infra* notes 32-71 and accompanying text.

[5] See *infra* notes 56-57 and accompanying text.

[6] See *infra* notes 72-79 and accompanying text.

[7] Joby Warrick, *A Bumper Crop of Waste*, RALEIGH NEWS & OBSERV., Mar. 5, 1996, at 6A. In 1989, North Carolina had 2.3 million hogs statewide in hog farms. In 1995, that total reached 8.3 million. *Id.*

[8] Joby Warrick and J. Andrew Curliss, *Managers Get Blame For Spill*, RALEIGH. NEWS & OBSERV., July 25, 1995, at A1.

[9] *Id.* The North Carolina Department of Environment, Health, and Natural Resources report stated that " 'the most probable scenario' was that wastewater overflowed near the point where the irrigation pipe was installed. Once the water began spilling over the side, the sandy soil in the lagoon's earthen walls eroded rapidly, allowing all of the sewage in the lagoon to gush out in less than an hour." *Id.*

[10] Joby Warrick, *State Finds 60 Farms Dump Waste*, RALEIGH NEWS & OBSERV., Sept. 15, 1995, at A1.

[11] Bill Broom, *Waste Spills Show the Need to Increase State's Regulation of Hog Farms*, GREENSBORO NEWS & REC., Aug. 13, 1995, at F3.

[12] Stuart Leavenworth, *State Goes Slow on Neuse*, RALEIGH NEWS & OBSERV., Dec. 14, 1995, at A1.

[13] *Id.*

[14] Joby Warrick, *A Bumper Crop of Waste*, RALEIGH. NEWS & OBSERV., Mar. 5, 1996, at A-1.

[15] *Id.*

[16] Randall Chase, *Rain Threatens Life in Neuse River*, GREENSBORO NEWS & REC., July 8, 1995, at B6. Recently, a national environmental group, American Rivers, named the Neuse River as "one of the nation's 20 most threatened rivers" listing nitrogen and algae as "major threats to the river's health." *Id.*

[17] Randall Chase, *Cape Fear River Basin in Danger*, GREENSBORO NEWS & REC., Aug. 25, 1995, at B3.

[18] Joby Warrick, *A Bumper Crop of Waste*, RALEIGH NEWS & OBSERV., Mar. 5, 1996, at A-1.

[19] *Id.*

[20] Several bills were introduced between 1993-95 which failed. *See, e.g.*, H. 524, N.C. General Assembly, Sess. 1996, draft of March 22, 1995, at 5-23 (A Bill To Be Entitled An Act to Protect the Public Health by Regulating the Management and Disposal of Animal Waste by Intensive Hog Operations); H. 845, N.C. General Assembly, Sess. 1996, draft of April 12, 1995, at 1-2 (an act proposing to declare that agricultural operations that continually violate environmental laws are nuisances); S. 394, N.C. General Assembly, Sess. 1996, draft of March, 1995, at 1-2 (proposing to eliminate the exemption of bona fide farms from the county zoning enabling act). One of the only regulations that has passed the General Assembly is a weak set-back regulation with no enforcement mechanism that requires swine farms or lagoons to be sited at least 1,500 feet from any occupied residen, 2,500 feet from any school, hospital, or church, and 100 feet from any property boundary. N.C. GEN. STAT. § 106-803 (1995).

[21] *See, e.g.*, N.C. GEN. STAT. § 106-700 (1979), stating:

> It is the declared policy of the State to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations. . . . It is the purpose of this Article to reduce the loss to the State of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance.

Id. The act, for example, declares that an agricultural operation cannot be the subject of a nuisance suit when an entity "moves to" the agricultural area. N.C. GEN. STAT. § 106-701 (1979). Prior to the enactment of this provision, North Carolina courts were also reluctant to allow nuisance suits against agricultural operations. *See, e.g.*, Moody v. Packing Co., 7 N.C. App. 463, 465, 172 S.E.2d 905, 907 (1970) (holding that the "operation of a hog buying station is not a nuisance *per se*" and that "courts are reluctant to enjoin the operation of a legitimate business enterprise").

[22] John Wagner and Joby Warrick, *Hunt Signals Crackdown on Swine Pollution*, RALEIGH NEWS & OBSERV., Aug. 22,

1995, at A1.

[23] *A Governor's Greening*, RALEIGH NEWS & OBSERV., Feb. 13, 1996, at A-10; *see also*, H. 524, N.C. General Assembly, Sess. 1996, March 22, 1995, at 2 (the bill creating the Blue Ribbon Study Commission on Agricultural Waste).

[24] Shannon Buggs, *Environmentalists Pitch Their Hog Plan*, RALEIGH NEWS & OBSERV., Mar. 1, 1996, at A3; Estes Thompson, *Summit Seeks Answers to Hog Waste Problems*, GREENSBORO NEWS & REC., March 2, 1996, at B2; Joby Warrick, *Hog Study Urges Stronger Rules for Waste Lagoons*, RALEIGH NEWS & OBSERV., Feb. 8, 1996, at A3; *Hog Farm Regulations Suggested*, GREENSBORO NEWS & REC., March 1, 1996, at B2.

[25] See *supra* notes 18-21 and accompanying text.

[26] Personal interview with Richard Ducker, March 25, 1996.

[27] See *infra* notes 32-57 and accompanying text.

[28] See *infra* notes 72-74 and accompanying text.

[29] *See Hunt Critical of Hog Panel*, RALEIGH NEWS & OBSERV., Feb. 3, 1996, at A-3.

[30] Joby Warrick, *Hog Hearings Open with Praise for Pork, Critics Pan Study Panel's Industry Ties*, RALEIGH NEWS & OBSERV., Oct. 12, 1995, at A1.

[31] *Id.*

[32] Nancie Marzulla, *State Private Property Rights Initiatives as a Response to "Environmental Takings"*, 46 S.C. L. REV. 613, 614 (1995).

[33] Michael Allan Wolf, *Overtaking the Fifth Amendment: The Legislative Backlash Against Environmentalism*, 6 FORDHAM ENV. L. J. 637, 637 (1995). Wolf argues that "many of the most prominent legislative champions of expanded private property rights have, somewhat recklessly, targeted federal endangered species regulations as particularly unjustifiable and unnecessary." *Id.* at 640.

[34] W.J. Tauzin, *'If You Take It, Pay For It,': Something's Wrong When a Rat's Home is More Important than an American's Home*, Roll Call, July 25, 1994, *available in* LEXIS, Nexis library, CURNWS File.

[35] Marianne Lavelle, *Environmentalists Fret as States Pass Reagan-Style Takings Laws*, NAT'L L. J., May 10, 1993.

[36] Wolf, *supra* note 33, at 637.

[37] U.S. CONST., Amend. V.

[38] Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 415 (1922).

[39] Nollan v. California, 483 U.S. 827, 835-36 n.4 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[40] Wolf, *supra* note 33, at 637 n.14 (1995).

[41] 438 U.S. 104 (1978).

[42] *Id.* at 124-25.

[43] *Id.*

[44] 458 U.S. 419 (1982)

[45] *Id.* at 432.

[46] *Id.* at 426-439.

[47] Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992).

[48] *Id.* at 2889. Although the District Court found that Lucas had been deprived of *all* of the economic value of his property, several Justices were skeptical of this finding, *see, e.g., id.* at 2908 (Blackmun, J. dissenting) ("This finding is almost certainly erroneous."); *id.* at 2919 n.3 (Stevens, J., dissenting) ("[H]is land is far from 'valueless.' "); *id.* at 2925 (Souter, J., dissenting) ("[T]he trial court's conclusion is highly questionable); *see also* Recent Legislation, 108 HARV. L. REV. 519, 524 n. 19 (noting this same phenomenon).

[49] James D. Smith, *Private Property Protection Legislation and Original Understandings of the Takings Clause: Can They Co-Exist?*, 21 J. LEGIS. 93, 97 (1995); *see also Lucas,* 112 S. Ct. at n.8 ("[T]he landowner whose deprivation is one step short of complete is . . . entitled to compensation. Such a owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, '[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally.")

[50] 114 S. Ct. 2309 (1994) (chastising city governmental officials for an uncompensated taking of property when the unconstitutional development conditions placed on a commercial landowner were not "roughly proportional" to the city's goals of traffic regulation and floodplain protection).

[51] 483 U.S. 827 (1987) (finding that the California Coastal Commission had unconstitutionally taken beachfront property by conditioning a building permit on the conveyance of a public easement). In *Nollan*, the Court noted that "unless a permit condition serves [a "legitimate state interest"], . . . [a] building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' " *Id.* at 837.

[52] *Id.* at 638.

[53] Lavelle, *supra* note 35.

[54] See *infra* notes 58-71 and accompanying text.

[55] H. 597, N.C. General Assembly, Sess. 1995, draft of March 28, 1995, at 1 (emphasis added).

[56] *See* Recent Legislation, *Land-Use Regulation—Compensation Statutes*, 109 HARV. L. REV. 542, 543 (1995).

[57] *Id.* at 633-35.

[58] Robert Meltz, *Property Rights Legislation: Analysis and Update*, 24 ALI-ABA 17, 20-21 (1996).

[59] Marzulla, *supra* note 32, at 635.

[60] *Id.*; *see, e.g.*, DELAWARE CODE ANN. tit. 29, § 605 (1995)

(mandating that no state regulation may take effect until the state Attorney General has informed the state agency whether its action may result in a takings); MONTANA CODE ANN. §§ 75-1-102, 103, 201 (1995) (declaring state policy to protect rights to use property free of undue regulation and requiring environmental impact statements as to regulatory impacts on private property); TENN. CODE. ANN. §§ 12-1-201 to 203 (1995) (requiring state Attorney General to review and identify governmental actions that may effect a takings and prohibit regulations that do effect takings); UTAH CODE ANN. §§ 63-90-1 to 4, 63-90a-1 to 4 (1995) (mandating takings impact assessments from state agencies).

[61] Marzulla, *supra* note 32, at 164.

[62] Meltz, *supra* note 59, at 20.

[63] *Id.* at 22.

[64] See Recent Legislation, *supra* note 57, at 543 ("In the past year, five state legislatures have passed laws to protect individual property rights by creating a cause of action for landowners to obtain compensation or equitable relief when the fair market value of their property is significantly diminished as a result of government regulation.") The five states are Florida (Fla. Laws ch. 95-181 §§ 1-3 (1995)); Louisiana (La. Rev. Stat. Ann. §§ 3: 3601, 3602, 3608, 3612, 3621, 3624 (1995)); Mississippi (Miss. Code Ann. §§ 49-22-1 to -19 (Supp. 1995); Texas (Tex. Gov't Code Ann. ch. 517 § 2007 (1995)); and Washington (Wash. Legis. Serv. 261 (West) (repealed by referendum, Nov. 7, 1995).

[65] The 15 states in which compensation bills have been introduced are California, Delaware, Florida, Georgia, Iowa, Kentucky, Mississippi, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, and Washington. Marzulla, *supra* note 32, at 635 n.135.

[66] The primary bills under consideration in Congress are H.R. 925, 104th Cong., 1st Sess. (1995) which passed the House of Representatives on March 3, 1995, and S. 605, 104th Cong., 1st Sess. (1995) which is Senate Majority Leader Bob Dole's companion to the House bill. For a discussion of both bills, see Payson R. Peabody, *Will the 104th Congress Revolutionize Fifth Amendment Takings Law?: An Analysis of the Private Property Protection Act of 1995*, 5 FED. CIR. B. J. 199, 203-206 (1995); *see also* James D. Smith, *Private Property Protection Legislation and Original Understanding of the Takings Clause: Can They Co-Exist?* 21 J. LEGIS. 93, 103-109 (1995) (examining whether legislative "attempts to protect private property comport with and further our commonly held notions of property while not unduly burdening government efforts to provide coherent guidance for regulatory agencies.").

[67] The bill proposed in Congress, for example, requires the federal government to compensate owners of property whose use of *any portion* of their property has been diminished by 20% or more by federal regulatory law. Peabody, *supra* note 67, at 203. President Clinton has threatened to veto the act describing it as "a requirement that Government pay property owners billions of dollars every time we act to defend our seashores or wetlands or open spaces." Peabody, *supra* note 67, at 200. The state compensation acts set different percentages. For example, Louisiana has a 20% loss threshold, Texas a 25% loss threshold, and Mississippi a 40% loss threshold. *See* Recent Legislation, *supra* note 57, at n.7. Washington's law (which was repealed by referendum), like the law proposed in North Carolina, required compensation for any diminution in value of private property. "That the Washington law was excessively 'stringent' was probably a primary factor behind its recent rejection by Washington voters." Recent Legislation, *supra* note 57, at n.7 (citing David Postman, *Washington State Rejects Land Rights*, WASH. POST., Nov. 11, 1995, at E1). Florida's bill does not set a percentage but requires the state government to compensate private property owners whenever a governmental regulation imposes an "inordinate burden" on the ability of the landowner to use her property. Recent Legislation, *supra* note 57, at n.9 and accompanying text.

[68] *See, e.g., Taking "Takings Rights" Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 ADMIN. L.J. AM. U. 253, 267 (providing the comments of Roger Marzulla who criticizes the "vague and uncertain" jurisprudence of takings law).

[69] Meltz, *supra* note 59, at 22.

[70] Marzulla, *supra* note 32, at 635.

[71] Pennsylvania Coal v. Mahon, 260 U.S. 393, 413 (1922).

[72] LaVelle, *supra* note 35 (noting the comments of former Solicitor General, now Harvard Law professor, Charles Fried who calls compensation bills "radical project[s]").

[73] *See* N.C. GEN. STAT. §.106-803 (1995) (requiring swine farms and lagoons to be sited away from certain protected neighboring properties like churches, schools and occupied residents).

[74] *Taking "Takings Rights" Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 ADMIN. L.J. AM. U. 253, 262 (1995).

[75] Morris R. Cohen, *Property and Sovereignty*, 15 CORNELL L. Q. 8, 13 (1927).

[76] Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 128 (1990). Professor Underkuffler also argues that the framers of the American Constitution did not believe in an individualistic approach to property law.

[77] H. 597, N.C. General Assembly, Sess. 1995, draft of March 28, 1995, at 4.

[78] D. MANDELKER, ENVIRONMENT AND EQUITY 40 (1981).

North Carolina's Wetlands Restoration Program

Ann Eberhart Goode

When the history of North Carolina's efforts to protect its water quality is written, one bright spot may be its wetland restoration efforts, and 1996 will stand out as a significant turning point. In July, the legislature enacted the Wetlands Restoration Program (WRP) (NCGS §143-214.8 - §143-214.13), a statewide effort to coordinate wetlands restoration efforts and mitigation projects[1] in order to make them as efficient and ecologically sound as possible. First, the WRP will identify degraded wetland areas, the restoration of which would improve water quality, wildlife habitats, flood control, or the health of fisheries. The WRP will then seek to concentrate public and private resources now spent on disconnected, scattered mitigation efforts on the identified sites, restoring the most ecologically significant areas in each of North Carolina's 17 major river basins.

This program has a great deal of potential for improving the quantity and quality of North Carolina's wetlands and their valuable functions. However, in the coming year, wetlands managers will have to make numerous decisions that will determine the fate of the WRP and whether it becomes a missed opportunity or a national example of a successful wetlands management program.

Historical wetlands losses are difficult to estimate, and evaluations of functional losses are even more tenuous. Nevertheless, researchers have estimated wetlands impacts in North Carolina and the causes of those losses. The North Carolina Division of Water Quality (DWQ, formerly the Division of Environmental Management) estimates historical wetland acreage in North Carolina to be 7.2 million acres. Approximately 34 percent of these wetlands have been degraded by agriculture, forestry and urban development since English settlement in the late 18th century (NCDEHNR 1994).

Over the past two decades, incremental progress has been made in reducing incentives for conversion of wetlands to agricultural or urban uses, and wetlands regulations have become stricter. The WRP should be viewed as an important positive step in North Carolina's progression toward better wetlands management in that it potentially improves the ecological efficacy of our wetlands management regime, and it injects an important element of certainty into the permitting process.

Because the program is still being developed, only the broad outlines of its operations and administrative structure are known. The WRP will be separate from the wetlands permitting office (NCDWQ 1996). When it is operational, the permitting authorities, both state and federal, will determine the amount to which wetlands can be destroyed and the extent of mitigation required. The WRP will then guide the location of the required mitigation projects and will be responsible for ensuring quality and completion of projects developed under its auspices.

Its data collection and mapping activities will indicate where wetlands should be restored. To implement its plans, the WRP will initiate public sector restoration projects and will work with the Army Corps of Engineers (ACOE) to create a regulatory context for privately run projects that will encourage private-sector restoration of the WRP's priority sites. Both public and private restoration sites will serve as "mitigation banks" whereby wetlands

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Wetlands Politics

According to Tom Bean, Executive Director of the North Carolina Wildlife Federation, the WRP was shepherded through the legislature by the powerful, bipartisan team of Senator John Nichols (R-New Bern) and Senator Marc Basnight (D-Currituck). Nichols is the Chair of the Senate Environment Committee and Basnight is the President of the Senate. Both are from coastal areas hard hit by water quality problems over the past several years. In particular, massive fish kills in Nichols' district prompted his serious concern about water quality matters

A program tailored to wetlands restoration was attractive to the legislature leadership because a four year struggle to overhaul wetlands regulation in North Carolina had come to an impasse. The wetlands overhaul was the state's effort to develop a "§401" program. §401 is the section of the Clean Water Act that requires federal permitting agencies to ensure that all relevant state laws are heeded before a development permit is issued. A §401 program is the state's permitting program, and a state can set more stringent standards than the federal government. North Carolina's §401 Water Quality Certification guidelines became effective in October of 1996. This program codifies a number of existing practices, but an important addition to federal wetlands protections is individual review, if necessary, of small impacts in headwaters wetlands. In November, a coalition of business and agriculture groups filed a lawsuit challenging the state's authority to regulate wetlands and asking that the new rules be voided.

In the wake of this serious conflict over the §401 program, the WRP met at least some goals of most stakeholders in the debate over wetlands regulation. Though it does not change permitting standards, it improves the existing program by making mitigation work better. In the parlance of dispute resolution, it appears to represent a significant joint gain.

While developers, landowners, and environmentalists all agreed to this program, each set of interests still harbors fears of unanticipated effects that reflect their broader view of wetlands regulation. Many in the regulated community who advocated for more manageable mitigation requirements are concerned that as mitigation becomes easier to handle, regulators will require more. Environmentalists, on the other hand, fear that if mitigation works well, regulators will rely more on mitigation and ease permitting standards. Developers would rather see mitigation demands eased, and environmentalists would rather see stricter permitting standards, not stricter or improved mitigation.

Still, the success of the WRP would accomplish many things, not least of which would be increasing the confidence of participants in North Carolina's wetlands programs in the states's wetlands management capabilities. North Carolina is growing rapidly, and more creative approaches will be needed to preserve its wetlands resources over the long run.

are restored (banked) in advance of permitted impacts, and mitigation for those impacts can be met by helping to pay for the offsite restoration (by purchasing credits). In essence, resources invested in mitigation efforts are pooled and spent to restore a significant wetland area somewhere else in the river basin.

The General Assembly has committed funds for the WRP, so not all state agency projects have to be paid for by funds generated by mitigation requirements. The extent to which public sector projects function as "mitigation banks" will depend on the level of general revenue appropriations and on the cost of public sector projects. Both regulators and private mitigation bankers anticipate that restoration of some sites will be uneconomical for entrepreneurial mitigation bankers and will have to be supported by the State.

The Legislature directed the Department of Environment, Health and Natural Resources (DEHNR) to allocate $500,000 to the WRP to develop necessary rules and begin mapping potential restoration sites. By July 1, 1997, DEHNR must "develop and begin implementing a basinwide restoration plan for each of the 17 river basins in the state in accordance with the basinwide schedule currently established by the DWQ" (§143-214.10).[2]

It is important to have a general understanding of how the wetlands permitting system works in order to understand the WRP. The federal Clean Water Act requires the ACOE, in consultation with numerous resource agencies, to control conversion of wetlands, and a developer whose site plan requires destruction of wetlands must first seek a permit from the ACOE. A key element of the Clean Water Act permitting process is its sequential analysis: (1) did the developer *avoid* wetland impacts as much as possible; (2) did the developer *minimize* the necessary impacts; and (3) what is the extent of unavoidable wetlands damage and how should that damage be *mitigated*? Since the Clean Water Act specifically allows some types of wetlands

impacts, mitigation is how agencies achieve our national goal of "no net loss" of wetlands.[3] If a permit applicant will unavoidably destroy wetlands, the ACOE will require mitigation of those losses.

Unfortunately, the success of attempts to create or restore wetlands has been limited because of regulatory confusion among agencies, private sector inexperience and resistance, and enforcement difficulties. The ACOE and EPA developed a Memorandum of Agreement (MOA) in 1990 (USEPA/DA 1990) that resolved differences in those agencies' mitigation policies. That MOA articulated a preference for "on-site" mitigation, that is, creation, enhancement, or restoration of wetlands on the parcel that is being developed. Unfortunately, some unanticipated consequences have emerged. Isolated wetlands restoration is not always viable, and sometimes large wetlands projects carefully sited in a watershed to maximize water quality benefits are more valuable. In addition, many developers with no experience in wetlands management were charged with protecting wetlands, and the proliferation of small mitigation projects has made enforcement an unmanageable task for the ACOE. On-site mitigation also forces wetlands restoration or creation efforts on a site that has been chosen for its development potential, not its ecological relevance in the river basin. Finally, there may be no restoration opportunities on a development site, forcing the developer to create new wetlands to meet mitigation requirements; however, successful creation of new wetlands has proven to be an elusive goal.

By locating wetlands restoration projects according to ecological benefits, the WRP could dramatically improve the environmental performance of mitigation expenditures. From a developer's perspective, the existence of mitigation opportunities in which they can easily participate and meet their mitigation requirements generates certainty and reduces risk associated with wetlands management. More generally, on-site mitigation perpetuates a reactive, case-by-case approach to efforts to preserve wetlands functions over time. By creating a planning context for restoration, the WRP has the potential to better compensate for cumulative impacts on water quality, wildlife habitats, and flood control.

The Task at Hand

The WRP has two basic tasks: (1) to develop a planning context for the siting of restoration projects; and (2) to coordinate mitigation (of permitted wetlands impacts) that will be implemented by either public or private entities. Creating a planning context means that the WRP staff must identify and prioritize potential wetlands restoration sites "consistent with" basinwide management plans. This is a large task which will require compilation and mapping of natural resources data from numerous state and federal agencies. Coordinating mitigation means that the WRP will have to create a system that allows developers to meet their mitigation obligations by participating in a public or private WRP restoration project. This is a technical task that essentially involves valuing the functions of the converted wetlands and the functions of wetlands being restored, and matching the two in a manner that is fair, ecologically valuable, and that achieves the goal of "no net loss" of wetlands.

Wetlands restoration is a young field and there are many unanswered questions and untested techniques; however, the WRP can rely to some degree on regulatory and scientific guidelines already in place in other state and federal agencies. Five federal agencies completed negotiations on a single set of guidelines for mitigation banks last year (Federal Guidelines 1995) and North Carolina's permitting program defines additional mitigation requirements that will also shape its restoration program.[4]

By creating a planning context for restoration, the Wetlands Restoration Program has the potential to better compensate for cumulative impacts on water quality, wildlife habitats and flood control.

Recent Events

In December, 1996, the ACOE published a notice of its intent to phase out Nationwide Permit 26 (NWP26), which exempts impacts to isolated wetlands of 10 acres or less from federal review and permit standards, such as mitigation requirements. The ACOE action reduces the exemption from 10 acres to 3 acres immediately and indicates that the agency will phase out NWP26 entirely in 18 months and propose a new policy for exempting *de minimus* impacts.

This important policy change will actively regulate many wetland impacts that are currently exempt from federal review and will clearly result in an increase in mitigation requirements, though the extent of that increase is unclear. In North Carolina, for example, 96% of wetland permits issued between 1991 and 1993 did not require mitigation, and almost half (42%) of those permits were exempted because of NWP26 (Pfeifer and Kaiser 1995). While changes to NWP26 will not bring all of these "non-compensatory" permits into the regulatory sphere, a significant portion of these impacts will require more formal review and will generate mitigation requirements.

The Planning Context

The environmental purpose of the WRP is comprehensive in scope:

- To restore wetlands functions and values . . . to replace critical functions lost through historic wetlands conversion and through current and future permitted impacts [i.e., cumulative impacts].
- To increase the ecological effectiveness of compensatory mitigation.
- To achieve a net increase of functions and values in each major river basin.
- To foster a comprehensive approach to environmental protection.[5]

This clear articulation of purpose is important because wetlands restoration alone does not imply consideration of a larger ecosystem. Technically, wetlands restoration simply requires repairing a site's hydrology, soil substrate, and site vegetation (Mitch and Gosselink 1993). The broader purpose of the WRP is to locate restoration projects where they will be the most effective in meeting the program's many goals. The difficulty is that the WRP includes no siting criteria, only general goals:

> The Department shall develop basinwide plans for wetlands and riparian area restoration with the *goal of protecting and enhancing water quality, flood prevention, fisheries, wildlife habitat, and recreational opportunities* within each of the 17 major river basins in the State. [NCGS 143-214.10]

Identifying potential restoration sites may not be difficult, because there is a great deal of information on wetlands values among various state programs. The more difficult challenge may be the prioritization of sites. Once degraded wetland sites are identified, how should the program value attributes that support other goals, such as habitat? To what extent can non-wetland areas be incorporated into restoration sites? What if the best wetlands for habitat are not the best for water quality in some basins or subsheds?

In addition to valuation of natural resources, planning will need to address the economic dynamics of a market in mitigation credits. High land values, in particular, may make it more difficult to develop restoration projects in urban areas, where many wetlands in the higher reaches of streams are being converted. This will raise equity concerns over the long term if mitigation of urban development impacts occurs primarily in rural areas. The urban landscape would bear the environmental impacts of wetlands lossed but receive none of the potential benefits of mitigation, such as flood protection, habitat preservation, and recreational opportunities. Another issue that some observers have noted is that land assembly may be more difficult along rivers where riparian restoration sites exist because of small parcel size and because property lines are usually in the center of the river, essentially doubling the assembly task since riparian restoration often requires that both banks of a river be incorporated into the project. The WRP does not have the power of eminent domain.

The WRP must identify the "right" sites and ensure that market and regulatory forces do not generate an unintended and environmentally detrimental pattern of restoration sites. Careful long-

Table 1: Existing Requirements for Mitigation Banks

Issue	§401 WQC	WRP	ACOE Guidelines
Siting/Planning Considerations	Participation in WRP preferred, unless it is impractical.	Consistent with basin-wide restoration plans.	•Ecological suitability; compatible with adjacent land use and watershed management plan, development trands, habitat needs; inclusion of uplands okay if ecologically sound; needs of watershed should guide siting. •On-site preferred; banks used only if on-site is not feasible or if bank is ecologically better.
Standards for use of Bank by Permittee Purchasing Credits to Meet Mitigation Requirements	Mitigation for unavoidable losses: restoration, creation, enhancement, preservation, in that order.	Requires assurances for perpetual land and hydrologic maintenance.	•Only unavoidable impacts can be compensated. •Service area defined by hydrologic and biotic criteria; extra-service area compensation allowable on case-by-case basis. Service area may be larger if supported by a regional plan. •In-kind compensation preferred. •Credit withdrawals commensurate with bank achievements. •With adequate financial assurance, prior withdrawal allowed.
Standards for Bank Operation	Sets ratios that vary according to distance from stream.	Pricing schedule for public banks.	•Prospectus •Public Review •Detailed instrument: goals; ownership; size/types of wetlands; baseline conditions; service area; compensable impacts; credit valuation method; ratios; accounting procedures; performance standards to determine credit availability; reporting/monitoring; financial assurances; long-term maintenance.

range planning that considers ecological needs, restoration potential and development patterns is an absolute prerequisite to a successful program. Without a strong geographic element and aggressive monitoring of the WRP, the potential benefits to wetlands and related ecosystems will not be realized.

Incorporating compensatory mitigation.

The WRP creates opportunities for those who have mitigation obligations resulting from permits. WRP policies will have to address the question of exactly how developers can participate in this program. The legislation lists four options:

- Payment of a fee . . . into the Wetlands Restoration Fund.
- Donation of land to the WRP or other conservation organization.
- Participation in an existing private wetlands mitigation bank.
- Preparation and implementation of a wetlands restoration plan (§143-214.11 (d)(1)-(4)).

The WRP will have to develop guidelines for these options. There may be some differences in the legal framework needed to regulate each category of "banker," but they are all engaging in a similar activity: taking mitigation resources generated from multiple wetlands impacts and focusing them on one restoration project.

Mitigation banks are generally defined by a "banking instrument," an agreement between the bank sponsor and the ACOE that defines the potential use of a bank, conditions placed on the restoration project, and long-term management and disposition arrangements.[6] ACOE guidelines determine the categories that must be included in any banking instrument, but leave much of the substance of the agreement to the parties. Given the site-by-site nature of the federal banking guidelines, WRP will have to

determine which program standards, if any, should be established for all WRP projects.

The recently enacted §401 Water Quality Certification Program creates some standards, and the WRP will provide information to ensure the primary program-level "standard," that potential sites be ecologically relevant at the river basin level. WRP staff will have to decide what other standards or guidelines to set. Table 1 outlines the existing requirements of the WRP, the §401 Water Quality Certification Program, and the ACOE guidelines.

Key Decisions Facing the WRP

Valuation

A key consideration in setting up a functioning mitigation bank is establishing the "value" of each restored acre, which determines how many mitigation credits the site can yield. Whether it is a private bank selling credits on the market, or a single-user public bank, a consistent procedure for determining the value of the restored functions is important. There are no legislative guidelines on how to "value" restored wetlands, but there are some slowly developing scientific procedures that are serving as an "industry standard."

Protocols for determining the value of a wetland area must reflect the goals of the landscape management regime. If the goal of the wetland restoration projects is water quality improvement, a protocol that assesses wetland functions relative to watershed needs (such as the "Wetlands Evaluation Technique") should be employed. Other protocols, such as the "Habitat Evaluation Procedures," place more value on habitat (Shabman, Scodari and King 1996). The WRP could maintain flexibility for project development by allowing sponsors to exercise limited discretion in determining the goals and valuation protocols of their banks. On the other hand, the choice of protocols is a key decision in attaining ecological goals for the river basin. One potential compromise would be for WRP to determine protocols for each basin, while allowing bank sponsors to utilize new techniques and technologies, when appropriate.

Pricing

For banks sponsored by public agencies, an additional valuation task is to actually set a price for mitigation credits. The market price for credits from private banks should be considered, but there are important differences between public and private banks. The biggest difference is that in the WRP, the public sector may restore sites that are out of reach of the private sector for various reasons, so the cost structure might be inherently different; that is, the cost may be much higher in some settings.

The managers of private sector mitigation banks may be concerned about public banks undercutting market prices. If prices are set too low, not only will private bankers be at a disadvantage, but it is unlikely that the public sector will accumulate enough money to restore or maintain wetlands. In addition, below-cost pricing effectively subsidizes developers' mitigation costs (Shabman, Scodari and King 1996). The WRP requires "full cost accounting" for public banks to ensure fairness and prevent any subsidy from below-cost pricing of credits (§143-214.11(e)). Some state officials view pricing as one of the more difficult yet important choices they will make.

The WRP will be competing in a marketplace that has other mitigation bankers, including the North Carolina Department of Transportation (NCDOT). Competitive pricing, in conjunction with some performance and policy issues, will determine whether the highway department turns to the WRP to purchase the mitigation credits. NCDOT is by far the largest developer in the state and will spend substantial sums on wetland mitigation in the future.

Ratios

Credit valuation assigns an ecological value to an entire restoration site for the purposes of the WRP. This creates a need for a method of converting restoration value into mitigation value, or a standard for trading. The use of exchange ratios is the most common method. For example, if a developer needs to mitigate impacts to two acres of wetlands, a 1:1 trading ratio would require the purchase of two acres from a restoration site or the WRP. Ratios can allow trading to reflect differences in functional value between the affected wetlands and the restored wetlands. For example, if the converted wetlands are closer to a stream than the restoration site, the ratio might be set at 2:1; four acres of restored wetlands are needed to mitigate the damage to two acres of more "valuable" wetlands.

The new §401 Water Quality Certification (WQC) program sets mitigation ratios based on distance from surface water and the size of the wetland impact. There are no mitigation requirements for impacts less than one acre. For impacts over one

acre the ratio depends upon distance from surface water. Within 150 feet of a shoreline, mitigation ratios are 4:1. If the affected wetlands are between 150 and 1000 feet from shore, the ratio is 2:1; for impacts over 1000 feet from surface water, the mitigation ratio is 1:1 (see Table 2). These ratios are for restoration only. If the mitigation requirements will be met by creating new wetlands, the ratios must be multiplied by 1.5. If enhancement is used, the multiplier is 2, and if preservation is used, the multiplier is 5 (NCDEQ(b) 1996). Thus, if a developer chooses to mitigate wetlands impacts within 150 feet of a stream through preservation of existing wetlands, 20 acres of preservation will be required for every acre affected by development.

Table 2: Ratios of Mitigation Required to Impacts Permits

Distance from suface water	Acreage of impact		
	≤1 acre	1-3	>3
0-150 feet	0	4:1	4:1
150-1,000 feet	0	2:1	2:1
>1,000 feet	0	1:1	1:1

Service areas

For any restoration site, another key decision is defining its service area. Can someone developing land anywhere in its river basin participate? What about developments just over the line or developments out of the basin but in the same geologic zone? Essentially, what is the correct ecologic unit for mitigation banking, and how can non-ecological concerns be incorporated? The §401 WQC program's area standards require impacts to the highest quality wetlands be mitigated through restoration of the same type of wetlands (in-kind) in the same watershed. Mitigation of impacts to a more prevalent class of wetlands can be mitigated by purchasing credits anywhere within an entire river basin. Coastal wetlands can be mitigated in their river sub-basin and must be in-kind. Within each river basin, these restrictions will influence the choice of restoration sites and evaluation of mitigation needs within that basin.

Long term management and financial assurances

There are no standards for the long term management and disposition of restoration sites developed under the WRP. The ACOE guidelines indicate that a bank's operational life ends when all credits are sold or allocated and the restored wetlands are functionally mature (the banking instrument should define indicators of functional maturity). In addition, the guidelines require protection in perpetuity through easements or title transfer to a public or nonprofit agency. Financial arrangements must be specified, but there are no ACOE standards for the endowment required to accompany a restored site when it is transferred to a conservation owner. Similarly, there are no standards for financial assurance of performance, but the guidelines do mention methods of assurance, including performance bonds, irrevocable trusts, escrow accounts, casualty insurance, letters of credit, and dedicated funds for public sector banks (Federal Guidelines 1995)

The WRP must determine whether to clarify these financial standards. While there may be a need to maintain flexibility for creative financing options, financial assurance is a specific cost to a bank sponsor. A clear standard will help the program meet its goal of making it easier for applicants to meet compensatory mitigation requirements.

The Division of Water Quality is currently negotiating a Memorandum of Agreement (MOA) with the ACOE that might address some or all of these questions. The MOA is also significant because it would make the WRP the lead agency in approving restoration sites. Under current law, mitigation bank sponsors must obtain a permit from the ACOE. No other state has an agreement with the ACOE on mitigation banking, so the extent to which the ACOE might pass its bank permitting authority to the WRP is unclear. Since the WRP's authorizing legislation specifically states that the program is voluntary, it would seem that a route for applicants to develop restoration sites outside of the WRP must be preserved so private mitigation bankers will be able to apply for a banking MOA directly from the ACOE if, for some reason, the WRP cannot accommodate the proposal. No matter how these issues are resolved, the terms of the MOA will be a defining element for North Carolina's program. It will also set the tone for the type of arrangement the ACOE might develop with other states that create comprehensive mitigation programs.

Conclusion

North Carolina's leaders appear to be serious about the WRP. They have allocated $9.2 million from the newly created Clean Water Management Trust Fund to meet the acquisition needs of the WRP for the coming fiscal year (§143-15.3B(d)). This is in addition to $500,000 reallocated from DEHNR for staff and administration. This level of commitment will allow the WRP to meet restoration goals in areas where the private sector cannot feasibly develop banks, such as in areas with high land costs. In addition, creative solutions to the intricate problems faced by wetlands managers must be pursued, and the public sector must have the resources to develop partnerships with the private sector. With healthy resources and strong leadership, the WRP will have great potential to implement creative problem solving in our wetlands management system, and bring thousands of acres of seriously degraded wetlands back into the hydrologic regime.

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Endnotes

[1] The Clean Water Act (and some state laws) requires compensation for unavoidable impacts to wetlands. Compensation can include restoration, enhancement, creation, or preservation of wetlands. Restoration is favored by regulatory bodies because it is the most likely strategy to succeed in expanding the quantity and quality of our wetlands inventory. Memorandum of Agreement between the US Army Corps of Engineers and the US Environmental Protection Agency Concerning the Determination of Mitigation Under the Clean Water Act 404(b)(1) Guidelines, February 6, 1990.

[2] NCGS §143-214.10. The schedule for basinwide management plans refers primarily to the permit evaluation schedule the plans create for industrial and municipal discharges in each river basin. There is no specific schedule for the inclusion of wetlands restoration sites in basinwide management plans.

[3] The goal of "No Net Loss" of wetlands was first articulated by the Wetlands Policy Forum, convened by the Conservation Fund in 1988. President George Bush in his 1990 budget address specifically made it a federal government goal.

[4] Water Quality Certification program developed by North Carolina pursuant to §401 of the Clean Water Act. The 401 Water Quality Certification program was effective October, 1996. This spells out the state's permitting regulations, which are in addition to federal permit requirements. No federal permit can be issued unless §401 regulations are met.

[5] NCGS §143-214.9(1),(4),(5) and (6). Other purposes, (2) and (3) of the same section, are to provide a "consistent and simplified approach" to compensatory mitigation and to streamline the wetlands permitting process.

[6] Federal Guidance for Establishment, Use and Operation of Mitigation Banks C(2). The ACOE guidelines give a list of elements that must be included in a banking instrument: goals, ownership, description of wetlands, baseline condition, service area, compensable impacts, credit valuation method, ratios, accounting procedures, performance standards, reporting/monitoring, contingency plans, financial assurances, long-term maintenance.

What Makes for a "Healthy" Business Climate?

Carl Rist and Bill Schweke

Rapid changes in the world economy have transformed national economies during the last 15 years. The insulation that national borders and federal policies provided have largely dissolved, exposing formerly protected state and regional economies to the challenges of the global economy. Today, a state government must act quickly to meet economic challenges created on the other side of the globe.

In meeting these challenges, state leaders and policymakers often assume that the most effective response is to work to improve their state's business climate. The term "business climate" generally refers to the perceived hospitality of a state or locality to the needs and desires of businesses located in, or considering a move to, that jurisdiction. In recent years, though, the term "business climate" has become almost synonymous with the pressure to cut taxes, limit services, and remove impediments, particularly employment and environmental regulations. Understood in this way, attempts to improve a state's business climate can lead to quite contradictory policies that ultimately harm a state's long-term economic health.

Consider, for example, some recent headlines from North Carolina. In March of this year, at the annual meeting of the North Carolina Citizens for Business and Industry, one of the state's top executives warned that the state's education system could hobble its future success. Noting that high school attainment and math proficiency are below the national average, Hugh McColl of Nation's Bank pointed out that too many North Carolinians are part of "yesterday's economy," and called for greater investment in education. On that same day, however, the state Court of Appeals ruled that, under the state's Constitution, the state's children have no fundamental right to "adequate" educational opportunities. In other words, the court left intact the prevailing system for funding public education — the use of local property tax revenues — and said it was bound by a 1987 ruling that permitted disparities in the quality of education from county to county (Raleigh News and Observer 1996).

Just one month earlier, on the same day that DRI/McGraw-Hill reported that one North Carolina metro area (Raleigh-Durham-Chapel Hill) was expected to have the nation's second highest growth rate over the next two years (Eisenstadt 1996), the state's Economic Development Board approved an enhanced package of business recruiting incentives for the state. Spurred on by Governor Hunt, who argued that North Carolina had lost 30 major prospects and thousands of jobs to Virginia and South Carolina over the previous three years, the Board agreed to expand the incentives offered by the state by reducing the state's corporate income tax rate and creating or expanding a number of other tax credits and exemptions (Nowell 1996).

How is it that policies designed to improve a state's business climate can appear so contradictory? In the paper that follows, we will explore more closely what constitutes business climate, compare traditional and alternative approaches of this concept, outline some principles and policy components that should guide a new approach to improving business climate

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— one that is broader in scope and more in keeping with the needs of both businesses and communities as we approach the turn of the century — and suggest some ideas for spurring action on this new approach.

The Business Climate Dilemma

Business climate refers to that combination of factors that determine whether a state or locality is an attractive place to do business. Although every company has a different set of requirements and expectations, there are usually three main components of business climate. The most obvious component is the cost (in land, labor, equipment, and taxes) of opening, expanding or operating a facility. The second is made up of non-cost factors, such as quality of life and amenities, which affect investment and location decisions. The third component is the extent to which an area and its elected and appointed government officials are perceived to be "pro-business."

Government has a major impact on business climate, for it is the combination of public services, taxation, and regulation that, to a significant extent, creates the context within which companies operate. This governmental role in business climate has been attracting much attention in recent years. In fact, as we noted at the outset, the term business climate has come to be identified almost solely with efforts to cut taxes and reduce government regulations. Yet, the arguments being made in this regard are not only economic. They are also intensely ideological, wrapped up in a growing anti-government sentiment, which sees almost any tax as theft and believes that government's most important job is to get out of the way.

The Dangers of a Traditional Interpretation of Business Climate

This traditional understanding of business climate is based on an outdated understanding of economic development that assumes closed national borders, relatively fixed levels of technology, and a finite number of jobs. The old view suggests that, in order to get these jobs, a state must offer lucrative inducements and promote its lack of development and wealth relative to other regions in the United States. According to this view, low tax and low wage conditions are touted as a strategic advantage in luring manufacturing companies and other firms which do not require a skilled or educated workforce.

But the world on which the traditional view is based no longer exists. America is now part of a truly global marketplace. A state's strategy of offering the lowest wages, lowest taxes, least bothersome environmental requirements, and lowest welfare benefits may work within the confines of a closed national economy, but it falls flat in a global context. The entire Third World and the emerging market economies of the formerly communist world are in a far better competitive position to use this strategy. States that rely too much on the low cost approach may attract the very firms that are most likely to move overseas a few years later, in search of still lower wages and even weaker environmental and employment protection standards.

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In today's economy cost still matters, but value matters more. As one development expert notes:

> The name of the game is value-added. The more value added on a per employee basis, the more wealth is created by the enterprise and the greater the economic return to workers, managers, and investors. Value added is not strictly a matter of productivity; it also reflects quality and service. Value is not the same thing as cost; a firm cannot necessarily add more value simply by reducing cost. Cost is established by the producer. Value is determined by the price the customer is willing to pay. [Williams 1990]

Thus, from a public policy point of view, a

business climate strategy should try to foster an economy that can produce the highest value goods and services, rather than trying to create the lowest cost environment. In other words, the goal of economic development should be to create the most profitable climates for new and existing businesses, not necessarily the cheapest. In this way, American firms can produce goods of such value that they can pay higher wages and salaries that will contribute to a rising standard of living.

Within the context of today's global economy, pursuing the traditional business climate approach to growth and competitiveness through indiscriminately cutting taxes, services, and regulations can lead to perverse consequences. By undermining necessary investments in research and development, primary and secondary education, physical infrastructure, adult retraining, and higher education, a state will likely *diminish* its long-term economic vitality. In today's economy, the measure of how a state or regional economy is likely to do in the future — that is, its potential both to compete in the face of rapid economic change and to generate sustained and widely shared economic opportunities — depends on its investment in its "development resources." These resources, such as the education and skills of the workforce, the extent to which new technologies and technically-oriented individuals and institutions are available, and infrastructure and amenities, are the building blocks of which state economies are composed, and upon which businesses depend.

At the same time, it is clear that government waste and inefficiency, poor accountability, outmoded budgeting systems, and inappropriate civil service, tax, regulatory, and public service systems are important contributors to creating unfriendly business climates. In building the case for an active public role in creating healthy business climates, policymakers must also be aware of the potential for these government failures.

Following the Traditional Recipe: Business Climate and the Southern States

No group of states has stuck more closely to a traditional approach to business climate than those in the southern United States. Modern industrial recruitment in the U.S. was born in Mississippi when the state's Balance Agriculture With Industry program began in 1936 to recruit manufacturing branch plants from the North with low-wage, non-union labor, inexpensive land, and low taxes. For most states in the region, this standard marketing approach has changed little over the years. Moreover, the southern states have enhanced their image among footloose firms by gaining a reputation as some of the most generous when it comes to offering tax and non-tax incentives. In what still counts as the blockbuster of all incentive deals, Alabama successfully recruited a Mercedes-Benz assembly plant in 1993 in return for $250 - $300 million in incentives.

From a public policy point of view, a business climate strategy should try to foster an economy that can produce the highest value goods and services, rather than trying to create the lowest cost environment.

Yet, the South's apparent success using this formula typifies the dilemma inherent in adhering to a traditional approach to creating a healthy business climate. The southeastern states have added 14 million jobs since 1970 — far outpacing the nation — but jobs in the region continue to pay below the national average. One of the reasons for the region's relatively poor job quality is the low skill level of its workforce. In one well-known benchmark of state economic performance, *The 1996 Development Report Card for the States* (see box), no Southern state earned above an average grade for its human resources and all five failing marks handed out went to states in the South. According to *The Development Report Card,* "the South is still lacking many of the key ingredients for future economic success, most notably an educated workforce" (Corporation for Enterprise Development 1996). Clearly, traditional business climate policies that undermine investment in critical development resources, such as education, can actually harm long-

term economic health.

What States and Local Communities Should Do

Fresh thinking is required about the way economic development is heading in the United States. Development officials, elected officials, business leaders, and the general public have to move the debate about business climate away from simplistic notions of tax competitiveness or "getting the government off our backs" to focus on the real disincentives to economic competitiveness and opportunity. States and local governments interested in improving the business climate need to follow two main directives:

- Design policies that improve the conditions for profitability and job creation, and
- Increase the accountability of tax and other incentives, if they are used as part of the overall development strategy.

The Policy Components of a "Positive" Business Climate

There are five key components of a *positive* business climate: education, physical infrastructure, regulation, taxation, and modernization. Policymakers must give serious attention to these components and not short-change them in an effort to appear "pro business."

Education. We have reached the stage where global competitive advantage is based primarily on the education and skills of the labor force. Other factors such as natural resources and proximity to markets and suppliers are clearly important, but the next leaps forward in productivity and innovation will require more flexible, articulate, thinking workers. Thus, wise investment in public education is an absolute must for creating a positive business climate. Yet investment should not imply simply throwing more money at education, but rather getting the most value out of additional education spending. This means focusing attention on goals such as improved student outcomes and increased accountability on the part of schools.

Physical Infrastructure and Public Services. Often neglected in the anti-tax debates is the importance of basic services — effectively and efficiently delivered — to the creation of a positive business climate. The repair and maintenance of highways and sidewalks, the management and operation of schools, the prevention of crime, the safeguarding of public health, and the care of public parks, are all essential to a community's quality of life. The reduction of tax revenues to the point where these services can no longer be adequately provided signals a reduction in an area's competitiveness.

Regulation. The main targets of those wishing to deregulate industry are employment and environmental regulations, which exist both to guard the health, safety, and welfare of the citizenry and to place some constraint on the more unacceptable aspects of the free market. Unfortunately, regulators have brought much of the present hostility on themselves. They have used overly bureaucratic procedures, focused on compliance rather than finding workable preventive solutions, and have applied uniform standards regardless of circumstances, cost or size of business. Business focus groups have shown that it is not the regulations themselves that cause them grief, but the way they are administered. A positive business climate is created by regulators who seek to work *with* business to achieve acceptable standards, whether in the workplace or in the environment, while at the same time *not* compromising their ability to enforce the law on behalf of public health and safety.

Taxation. There has been an overwhelming emphasis in recent years on tax competitiveness and tax rates. What gets lost in these discussions is the opportunity to strengthen state and local tax systems so that they can enhance business climate. In addition to tax competitiveness, other equally important goals of a tax system include: *reliability* — stable and certain revenue generation and consistent rates; *balance* — a spread across a range of tax sources without over-reliance on any one; *equity* — a fair system which shields subsistence income from taxation, is progressive, and imposes the same tax burden on households earning the same income; *efficiency* — easy to understand, minimal compliance costs, simple administration; and *accountability* — public information on sources and uses of tax revenues, and information about revenues effectively lost due to tax breaks. The best tax climate is one which adequately addresses each of these objectives, along with tax competitiveness.

The Development Report Card for the States

The Development Report Card for the States, published annually by the Corporation for Enterprise Development (CFED), is an assessment of the strengths and weaknesses of each state's economy and its potential for future growth. *The Development Report Card* grades each state's economy (A to F) in three "subject" indexes using over 50 socioeconomic data measures. The three graded indexes are structured to measure:

Economic Performance: What are the economic benefits and opportunities provided to citizens by the state's economy?

Business Vitality: How vital and dynamic is the state's business sector?

Development Capacity: What is the state's capacity for future growth and recovery from economic adversity?

The following explanation of North Carolina's grades is excerpted from the state's 1996 *Report Card.*

Economic Performance - C
North Carolina continues to ride along in the middle of the pack with a strong, growing economy whose benefits may not be reaching everyone. The state has one of the nation's best overall employment situations (including the 11th best unemployment rate). In addition, the earnings and quality of existing jobs are good (the 10th best average pay growth). Yet, it is poor rankings in most of the equity measures that mar the economic picture. Meanwhile, the state's excellent environmental surroundings are countered by poor social conditions (including a very high infant mortality rate).

Business Vitality - A
The biggest improvement for North Carolina is a three grade jump in Business Vitality. This progress is due to significant improvements in the competitiveness of existing businesses and a large increase in the rate of new companies being formed. Meanwhile, the state maintains a better than average mix of industries.

Development Capacity - C
North Carolina's development resources have inched upwards in rank, if not yet in grade. The state's biggest strength is the nation's best overall financial resources (not just due to its banks: venture capital and small business investment corporations also rank near the top). But human resources and infrastructure are weaknesses: the state ranks 41st in high school graduation, and highway conditions are among the nation's worst.

The Development Report Card for the States can be purchased for $75 from CFED at 777 North Capitol Street, NE, Suite 410, Washington, DC 20002, (202) 408-9788.

Modernization and Entrepreneurship. For years, much of economic development has also focused on the "homegrown economy" by providing financial support through grants, low interest loans, and advisory services to businesses. The focus has been on retaining and modernizing businesses in a particular area or on encouraging successful entrepreneurial initiatives. The challenge is to turn these programs into effective delivery systems. Systems such as these must include public and private providers and address the pressing need for businesses to modernize and to upgrade their technologies to maintain competitiveness. Communities need economic development efforts that pursue the high-road of greater skills, higher productivity and better wages, and deliver these development services with

greater quality, customer friendliness, accountability and cost-effectiveness.

Making Development Incentives More Accountable

The choice of whether to offer development incentives presents a fundamental dilemma for state and local policymakers. On the one hand, most economists agree that they are not good development policy — due to cost, risk, questions of effectiveness, etc. On the other hand, there seems to be no doubt that incentives *can* make a difference in the site selection process, particularly when the choice comes down to one of two similar locations. Thus, business attraction should not be seen as a worthless exercise. Rather, the challenge for state and local governments is to find a better way to respond to this dilemma *and* to act with greater fiscal integrity.

To do this, innovative state and local governments should act on the following five directives:

Strengthen Accountability and Disclosure. If incentives remain in a government's development policy portfolio, they must be accompanied by a range of accountability and disclosure provisions, including:

- Full public disclosure of incentive costs. Some states even disclose how much an individual company benefits from the incentives.
- Rigorous and standardized approaches for calculating the costs of each job created or retained.
- Accurate tax expenditure reporting if tax-based incentives are used.
- "Sunset" reviews to assess the effectiveness and impact of tax and non-tax incentives.
- Establishment of benchmark "return on investment" targets, if incentives are to be enacted or maintained.

Limit Development Incentives to Strategic Uses. Incentives must be designed much more strategically: they should be "custom-fit," not "copy-cat." They must create significant numbers of jobs cost-effectively and fit with the state's highest development priorities. Moreover, policymakers should set clear goals and criteria for what sorts of projects deserve financing. For instance, after a careful evaluation of a jurisdiction's needs, priorities, and opportunities, policymakers might focus on any of the following goals: overall job creation, job growth in slower growing areas, industry diversification, increased minority employment, the attraction of high tech industries, or the creation of "quality" jobs.

Pick the Right Incentives. Since not all incentives are the same, policymakers must give special attention to allocating scarce resources to the types of incentives that have the greatest potential accountability and that are likely to provide the broadest benefits beyond the company assisted. For example, investments in training or physical infrastructure accrue to the broader community and remain in a community, whether a particular company stays or not. Cash grants, on the other hand, belong to private businesses alone.

Link Incentives and Employment Programs. States should also explore how to link "first source" hiring agreements with their incentive efforts. Such agreements require private companies that receive public monies to agree to consider hiring displaced or economically disadvantaged workers through a public or nonprofit operated job referral and training service. One strategy might be to encourage the use of first source agreements in fast-growing areas of a state. This would ensure that recruitment efforts indeed help those most in need of jobs and would also "level the playing field" between high-growth and lower-growth areas. In addition, states should consider cutting incentives for capital investments and using these monies instead for employment-based incentives, such as for new hires, for training, and for above average wages. This is essential if a state is focusing on employment generation more than productivity goals.

Show Political Leadership. Far-sighted state leadership should look for ways to slow the "arms race" by:

- Working with other states to devise workable compacts for responsible incentive competition.
- Exploring the feasibility of federal legislation to restrict interstate bidding wars.[2]
- Educating their constituencies about: (1) the dangers posed by an unregulated incentives arms

race and the fact that most new jobs come from expansions and new business start-ups — *not* from relocations, and (2) the fact that creating the conditions for profitable companies (i.e. delivering quality public services in an efficient manner) has a much greater impact on job growth than the combined effects of a state or local community's entire economic development arsenal.

How Do We Get There?

What are the actions required to begin moving on this new approach to creating healthy business climates? After all, there are many players in the current business climate arena. Economic development is viewed very differently by these myriad actors. And despite the strong case that can be made for a new business climate approach, it will not be easy to get policymakers to adopt a more inclusive concept of economic development. Many interests also benefit from the current state of affairs. Leading spokespersons, representing all political persuasions, are wedded to old ways of conducting public business.

Economic development, furthermore, is not just a technical profession. It is also about politics, contested values, interests, and ideologies. Rational discourse is not something that can be accomplished through governmental edicts and powerful speeches from the "bully pulpit."

But we do need a wider, not a narrower, debate. Economic development is just too important to be left to economic developers. Everybody has a stake in its outcome. Moreover, getting rid of the old paradigm is a practical matter, because practical solutions to our largest challenges require creating partnerships outside the typical department of development or chamber of commerce orbit. Schools, community action agencies, regulators, business trade associations, utilities, banks, trade unions, community development organizations, and many others must be engaged in the solutions. With their help communities can tackle issues like combining increased competitiveness with rising living standards, raising productivity while increasing employment opportunities, or protecting the environment while still creating jobs.

But if we are to succeed at this new development agenda, various constituencies must talk about the issues of jobs and competitiveness differently than they do now. A wide range of key constituencies or opinion leaders can best use these ideas and advance a new positive business climate agenda by playing the following roles.

Community activists and leaders. Leaders have been described as those "who work to transform the world for the better and who inspire others to do the same." Their role is to become more knowledgeable about the issue of business climate and to seek to broaden the discussion of development alternatives and their pros and cons in all relevant public forums. They are in the ideal position to ask the sorts of questions raised in this paper. These questions need more informed and wider public discussion. *In other words, help communities to apply new development concepts to the real world and think more strategically about issues and options.*

Tax and budget advocates. Lobbyists for responsible tax policies and decent human services and income maintenance policies for the poor need to face head-on the challenges posed by governmental budget-cutters by linking their proposals to public and business concerns about jobs and international competitiveness. Practicing responsive and accountable government, in fact, is a sound business climate strategy. A state or locality can spend too much on traditional economic development activities and too little on honest, well-delivered, "bread and butter" public services. Moreover, well-planned and implemented investments in education, health care, and child development should be part of an overall development strategy and should be maintained in both good and bad fiscal times. *In essence, make the case for well-financed and delivered public services and responsible investments in people.*

City councils and state legislators. Elected officials must ensure that the public sector spends its money wisely. Given both tight budgets and growing demands on local government, providing basic public services requires government to act strategically and frugally. Nowhere is this more important than in the area of financing economic development services and business incentives. Just because a policy is in the name of economic development does not mean that it is, indeed, in the public interest. *In short, act as fiscal watchdogs.*

Mayors and governors. We agree that chief executives are the public dealmakers, but we think that their job is to close *good* deals, not just *any* deals.

They must act as prudent investors and not just spenders of taxpayer monies. And given their larger responsibilities for delivering public services responsibly and cost-effectively, they must use their economic development programs and investments to preserve and enhance the state's or locality's assets — its human, physical, financial, natural, and social capital. These fiduciary duties must also be discharged in the most effective manner possible. This means making use of a variety of tools and strategies, inlcuding public provision of services, tax incentives, public-private partnerships, regulation, vouchers, charter schools, labor-management cooperation councils, and so forth. *Hence, be smart investors and do not neglect improving the quality of all development-enhancing public services.*

Educators. Quality public education is an important element of an attractive business climate. But additional investments in education need to take place in the context of reform, rather than providing more funding for "business as usual." *Thus, create an educational system that invests its resources more effectively in preparing all of a state's citizenry for economic and civic success in today's society.*

Unions. Today's unions have new roles to play. Organized labor must cease playing just "nay-saying" roles in economic development debates. They must take a more central place at the table where business climate decisions are made. Moreover, they need to act much more pro-actively in shaping regulatory and tax reforms that are simultaneously pro-worker, pro-business, and pro-consumer. Through their collective bargaining and advocacy roles, they need to explore new ways to create the conditions for more high performance workplaces that combine higher skills, more productivity, and better quality jobs (higher wages, better fringe benefits, more employee input, real career ladders, etc.). *Unions then should shape regulatory and tax reforms whereby the vast majority wins and help to foster more "good jobs."*

Businesses. The private sector is the ultimate creator of jobs. But increasingly in today's economy, the solutions to increased profitability and better and more economic development require building partnerships with other actors. As a result, businesses must find new ways to balance the multiple hats they wear — the pro-education hat, the United Way hat, and the cut-our-taxes hat. Squaring these positions requires seeking creative solutions that give more than lip service to each concern and honestly recognize the real trade-offs and compromises that are inevitable in our imperfect world. *Businesses, above all, must collaborate with other partners in new development efforts and seek new "win-win ' alternatives to the traditional business climate conflicts.*

Media. Journalists can add further value to the dialogue we need over appropriate aims and means for economic development by ceasing to frame the larger public debate in the typical "us versus them" ways (for instance, a battle between those that are pro-development versus those who seem to be pro-environment, pro-union, or pro-tax-and-spend.) Instead, they should shine a brighter light on economic development policy and practice to help it meet a higher public standard. Here, the real issue for both taxpayers and development professionals is the same: *How do we achieve greater accountability and make more intelligent public investments?*

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Endnote

[1] See work done by economists Melvin Burstein and Arthur Rolnick at the Federal Reserve Bank of Minneapolis in *Congress Should End the Economic War Between the States*. Burstein and Rolnick propose that Congress impose sanctions such as taxing imputed income, denying tax-exempt status to public debt used to compete for business, and impounding federal monies owed states involved in such competition. Others have proposed restricting the use of incentives to those areas with high unemployment or slow job growth.

Fifteen Steps to Effective Code Enforcement

Raymond J. Burby and Peter J. May

Few would argue with the assertion that urban crime is out of control in cities across the United States. The less-told story is the crisis in another type of crime: violations of building, environmental and land-use regulations. Yet here the evidence of system failure is equally stark. In North Carolina, recent reviews of compliance with erosion and sedimentation control permits (Burby et al. 1990) and coastal permits (Brower and Ballenger 1991) revealed rates of violation in excess of 50 percent. Reports from other states are equally distressing and the consequences especially tragic. In south Florida following Hurricane Andrew, fully a quarter of the more than $20 billion in property losses was attributed to shoddy construction not in compliance with the building code (Building Performance Assessment Team 1992). In Kansas City in 1980, 113 people were killed and 200 others injured when the skywalk in the Hyatt Regency Hotel collapsed, due to design faults, according to some reports, that were not caught by the code enforcement system (Waugh and Hy 1995).

Twenty-three years ago, Jeffrey Pressman and Aaron Wildavsky wrote in their classic book, *Implementation* (famous for its subtitle: *How Great Expectations in Washington Are Dashed in Oakland Or Why It's Amazing Federal Programs Work at All This Being a Saga of the Economic Development Administration as Told by Two Sympathetic Observers Who Seek to Build Morals on the Foundations of Dashed Hopes*) that even the most carefully thought out programs often failed to accomplish their ends because of glitches in the way they were carried out. Planners, who spend untold hours crafting new land-use regulations and ever more detailed development permit conditions, have yet to learn this lesson, since they spend little time thinking about whether permit conditions will ever be fulfilled. In part, this neglect may stem from ignorance of what to do to make enforcement more effective. Some attention has been given to the use of financial performance guarantees to assure compliance (e.g., Feiden et al. 1989), but key texts such as *The Practice of Local Government Planning* (So and Getzels 1988), *Urban Land Use Planning* (Kaiser et al. 1995), *Managing Community Growth* (Kelly 1993), and *Growth Management Principles and Practice* (Nelson and Duncan 1995) make no mention of enforcement, and only one Planning Advisory Service (PAS) Memo has been prepared on this subject (see Kelly 1988).

This article has two purposes. One is to urge planners to pay more attention to code enforcement. The other is to suggest concrete steps local governments can take to improve the chances that building and development regulations will be followed by developers and building contractors. These suggestions are based on the results of a national survey of city and county building departments and an analysis of the code enforcement practices of thirty-three North Carolina local governments.

About the Data

In 1995 we surveyed a national sample of 995 city and county building departments to identify methods they were using to enforce building codes and to learn about the successes and failures they had

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experienced. In addition, the survey probed for information on a number of governmental characteristics and situational factors that might affect code enforcement practices and outcomes. Responses were received from 819 local governments (an 83 percent response rate).

The survey data were analyzed using multivariate statistical techniques to isolate factors associated with higher and lower rates of compliance by the private sector. Based on the multiple regression results, an "effects analysis" was performed to see how compliance would likely change if a local government changed the value of each of the significant predictors of compliance from the level of the lowest quartile (25th percentile) in the sample to the level of the highest quartile (75th percentile), while holding constant all of the other factors that affect compliance (see Burby et al. 1996). This analysis produced a list of fifteen key factors, ordered by the strength of the likely effect a change in their value would have on improving compliance.

To make these data more relevant to North Carolina planners and code administrators, we calculated the mean values of the key effects variables for North Carolina local governments and compared them to the mean values for local governments in other states that have attained the highest rates of compliance. This comparison helped isolate enforcement practices in North Carolina that fall farthest short of the most successful enforcement programs. The North Carolina local governments studied are listed in the appendix.

Fifteen Steps to Effective Enforcement

Table I lists fifteen ways to improve compliance with building codes and indicates the approximate percentage improvement in compliance that could be accomplished when a local government implements one of the steps listed in the table. Because the effects measures are based on statistical analysis of subjective indicators (such as units of estimated staff adequacy on a five-point scale), the steps are less precise than those one would find in a cookbook, and planners and code administrators will have to experiment with exact amounts of each ingredient in concocting their own "Effective Enforcement Stew."

There are no quick fixes that are likely to produce large improvements in compliance with codes. . . . local governments can bring about a marked improvement in code compliance by implementing sets of related actions.

A quick glance at Table I shows there are no quick fixes that are likely to produce large improvements in compliance with codes. Instead, most steps will result in incremental progress and will be used in combination with other similar steps. As we note below, local governments can bring about a marked improvement in code compliance by implementing sets of related actions.

Staffing

A number of reviews of code enforcement have singled out shortfalls in staffing as the single most important barrier to effective enforcement (e.g., National Commission on Urban Problems 1968; Southern Building Code Congress International 1992). Our analysis reinforces this conclusion. By improving the adequacy of staffing from the level of the lowest quartile to the level of the highest quartile in the sample of localities studied, compliance could improve by 15 percent. Further gains in compliance could occur if other aspects of capacity are enhanced similarly: improved staff technical expertise could raise compliance levels by 3 percent; improved legal support could produce a 1 percent gain; and reducing the workload of field inspectors could result in about a 0.5 percent improvement. In combination, these enhancements in capacity might lead to as much as a 20 percent gain in compliance with code requirements.

Effort to Enforce

Having adequate staff on board is important, but unless enforcement agencies use their personnel to

Table 1. Fifteen Steps to Effective Enforcement of Building Codes

Steps Producing a 10% to 20% Improvement in Compliance

Improve adequacy of staffing
Increase effort devoted to on-site inspections

Steps Producing a 5% to 10% Improvement in Compliance

Institute state requirement of local code enforcement
Increase technical assistance to developers, builders, contractors

Steps Producing a 1% to 5% Improvement in Compliance

Reduce degree of coercion employed in enforcement
Reduce surveillance to detect building without a permit
Improve staff technical expertise
Increase effort devoted to checking building plans
Develop proactive enforcement goals
Increase level of legal support of code enforcement
Employ flexible enforcement strategies
Improve competence of contractors

Steps Producing Less than 1% Improvement in Compliance

Reduce effort devoted to legal prosecution
Increase effort devoted to public relations
Reduce number of inspections per day required by each field inspector

Note: Each estimated effect is based on change from the level of the 25th percentile of all jurisdictions to the level of the 75th percentile of jurisdictions. Effects are predicted from multiple regression analyses reported in Burby et al., 1996.

mount a strong, proactive enforcement effort, code violations are likely to continue to be excessive. Like capacity shortfalls, the lack of aggressive enforcement is thought by many experts to undermine government regulatory programs (e.g., see Kagan 1994). Our data lend support to this conclusion. By taking steps to increase the level of enforcement effort from the lowest to the highest quartile of local governments, compliance rates could be improved significantly. Specifically, an increase in the effort devoted to field inspections could raise compliance levels by just under 10 percent; increasing effort devoted to technical assistance could raise compliance levels by over 5 percent; increasing the effort devoted to plan checking could result in a 3 percent increase in compliance; and the formulation and active pursuit of enforcement goals could lead to a 1 percent increase. Together, these enhancements in enforcement effort might lead to as much as a 20 percent improvement in compliance levels.

Style of Enforcement

Increasing the effort devoted to enforcement does *not* mean that local governments should be more coercive in their dealings with the private sector. In fact, contrary to conventional wisdom (for example, see Bressi 1988), just the opposite is true. Our data show that what regulatory theorists term a "flexible" or "cooperative" style of enforcement will pay dividends in enhanced compliance, while coercion will actually reduce compliance (for evidence of a similar effect for other types of regulation, see Ahlbrandt 1976; Bardach and Kagan 1982;

Braithwaite 1982; and Scholz 1984). Steps to take in enhancing cooperation with the private sector include: reducing the degree of coercion employed in enforcement (that is, making less use of stop work orders and fines when violations are detected); reducing the effort expended in prosecuting violators; and reducing surveillance to detect buildings without a permit.

At the same time, enforcement agencies should take positive steps to build good working relationships with contractors. These include: spending more effort on public relations; instituting flexible enforcement procedures (explanation of provisions violated, advice on how to fix them, bargaining to agree on a schedule to correct infractions, and relaxation of standards when costs of compliance exceed benefits to the public); and incentives such as relaxed inspection schedules and leniency when violations are detected to reward those who make a sincere effort to comply. In combination, these measures can enhance compliance by as much as 5 percent. Moreover, since cooperation will not be successful unless staff capacity and competence also are adequate, if a cooperative strategy is undertaken in conjunction with enhancements in enforcement capacity, compliance levels could be increased by over 25 percent.

Role of the State

North Carolina is one of twenty-seven states that have adopted statewide building code requirements and mandated local enforcement (May et al. 1995). Eight states have legislation which enables but does not require local building code enforcement, and fifteen states leave code enforcement solely to the discretion of local governments. Our data indicate that state mandates such as North Carolina's have a marked effect in promoting compliance with building regulations. We think this occurs because state mandates cause local officials to give code enforcement more priority in budget allocations and deter them from undermining compliance by meddling excessively in enforcement cases in order to reward key constituents.

Improving Code Enforcement in North Carolina

North Carolina local governments have attained rates of compliance with the state building code that are similar to those of cities and counties nationwide. On a scale of 1 (low) to 10 (high), the mean North Carolina local government has a compliance score of 8.2; the national average is 7.9. Nationwide, 8 percent of the governments we surveyed reported compliance levels of 5 or below on the 10-point scale, indicative of a serious failure of the enforcement system. In North Carolina, 6 percent reported similar difficulty in attaining compliance.

Two North Carolina localities we surveyed and 45 others nationally were much more successful than average in gaining compliance (they scored a 10 on the 10-point scale). Comparison of the enforcement practices of high-compliance places with the practices of other local governments provides a way to isolate enforcement practices that are lagging and might be focused upon first to improve performance (see Table 2).

North Carolina localities fall short of localities in other states that have attained the highest rates of code compliance in five of the fifteen steps to effective enforcement: staff technical expertise, technical assistance effort, plan checking effort, legal support, and contractor competence. These deficiencies are interrelated. For example, a technically competent staff is needed to offer technical assistance and to check building and site plans for compliance with code requirements. Low rates of contractor competence probably reflects, in part, lack of technical assistance from local building code agencies. Legal support also tends to be far less adequate in North Carolina localities, as does staff adequacy in general, although this latter difference is not statistically significant at the .05 level.

These data suggest that enforcement results in North Carolina would be enhanced significantly if local governments allocated more resources for the code enforcement function, particularly for additional staff, staff training, and legal support. With added staff, it would be possible for agencies to review building plans more carefully, offer technical aid to the private sector, and to work in other ways to improve the competence of building contractors.

North Carolina localities are more likely than high ranking localities in other states to use flexible enforcement strategies, and they devote less effort to legal prosecution. With adequate staff resources, this relatively cooperative stance toward the private sector would enhance compliance. Without adequate staff resources, however, flexibility is likely to simply result in lax enforcement and a weak level of commitment to comply among developers, builders and contractors. Thus, by enhancing the capacity of the enforcement staff, local governments will improve

Table 2. Progress in North Carolina with the Fifteen Actions for More Effective Enforcement in Comparison with Local Governments with the Highest Compliance Rates

Enforcement Improvement Action[a]	Mean Values on Actions: High Compliance Localities[b]	North Carolina Localities[c]
Staff adequacy (1-5)	3.6	3.0
On-site inspection effort (1-5)	4.9	4.9
State mandate (1-3)	**2.6**	**3.0**
Technical assistance effort (1-5)	**4.4**	**3.8**
Degree of coercion (-2.5 - +2.8)	0.1	-0.08
Surveillance effort (1-5)	3.5	3.0
Staff technical expertise (1-5)	**4.7**	**4.2**
Plan checking effort (1-5)	**4.8**	**3.9**
Proactive enforcement goals (1-3)	2.8	2.5
Legal support of enforcement (1-5)	**2.3**	**1.9**
Flexible enforcement (-2.4 - +3.3)	**-0.7**	**-0.1**
Contractor competence (1-4)	**1.5**	**1.1**
Legal prosecution effort (1-5)	**2.8**	**2.0**
Public relations effort (1-5)	3.7	3.9
Inspector workload (0-50)	12.3	11.4

[a]Table entries show mean values for scores on different enforcement actions. The range of possible scores for each item is shown in parentheses. Actions in boldface type indicate the difference between North Carolina local governments and local governments in other states that have attained the highest compliance with building code regulations is statistically significant at the $p < .05$ level.
[b]Local governments in states other than North Carolina where compliance with building codes is rated 10 on a scale of 0 (low) to 10 (high). N = 45
[c]North Carolina local governments. N = 33 (includes 2 governments which scored 10 on the 10-point compliance scale)

compliance both directly and, by making flexible enforcement strategies more effective, indirectly as well.

Conclusion

Catastrophic failures of buildings are a hard way to learn that the specification of rules governing building and development mean little if corresponding steps are not taken to ensure that rules are subsequently followed in the urban development process. In this article, we have shown that breakdowns in enforcement have occurred in local governments in North Carolina and other states. But, we also have demonstrated that there are clearly marked steps to achieving high rates of compliance with regulations. Individually, each of the fifteen steps we have identified will produce only a small increment of improvement. If used in combination with each other, however, significant gains can be made. In particular, our research points to the importance of improving staff capacity to enforce regulations coupled with an aggressive effort to use available capacity in working with, not against, the private sector. With a cooperative approach to enforcement that includes adequate inspection and plan checking undertaken by competent personnel with sufficient legal support in interpreting regulatory requirements, technical assistance, and the use of incentives and flexibility in addressing enforcement issues, compliance can be assured. Planners, we believe, can do much to promote effective code enforcement in North Carolina and elsewhere. In this article, we have pointed the way for undertaking this

important task.

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Appendix: North Carolina Local Governments Included in the Study

Albemarle, Alexander County, Anson County, Asheville, Black Mountain, Boone, Buncombe County, Catawba County, Chapel Hill, Concord, Durham, Elizabeth City, Forest, Gaston County, Gastonia, Greensboro, Henderson County, Hickory, High Point, Jackson County, Lenoir, Lincoln County, Marion, Mecklenburg County, Orange County, Rockingham, Rocky Mount, Shelby, Statesville, Union County, Waynesville, Wilmington, Winston-Salem

A Zoning Odyssey: The Quest for Initial Zoning in Pitt County

Jeffery G. Ulma

For most planners, zoning is a given. They arrive on the scene to administer a set of accepted regulations. In Pitt County, North Carolina, there are no such regulations. This article will describe a trail-blazing effort to develop and adopt Pitt County's first zoning ordinance. While it was a frustrating undertaking, and the Board of County Commissioners eventually chose not to adopt zoning, this five-year effort was not without value. Planning staff produced a unique county-wide zoning ordinance proposal, which will serve as a foundation for future zoning discussion, and along the way staff learned several important planning lessons. Hopefully, our experience will serve to guide other planners who face the challenge of similar ground-breaking initiatives.

The Setting

As a regional center of higher education, medicine, and industry, Pitt County is often viewed as the most progressive county in eastern North Carolina. It is one of the state's most populated and fastest-growing counties without zoning. Historically, the county has been an important agricultural center in North Carolina's coastal plain, famous as the world's number-one producer of flue-cured tobacco. Over the past few decades, however, a more diverse economy has developed with the continued growth and emergence of East Carolina University, Pitt County Memorial Hospital, the ECU School of Medicine, as well as service, manufacturing, and pharmaceutical industries.

This county of 116,000 people comprises ten incorporated communities ranging from 100 to 50,000 in population. The largest city, Greenville, is located in the center of the county on the banks of the Tar River, the most prominent physical feature. Almost all municipalities have adopted zoning regulations, and eight exercise their planning and zoning powers one mile beyond their corporate limits. Over 500 square miles of the county remain unzoned, however, with nearly 50,000 people residing in the unincorporated area.

Single-family developments and manufactured home parks are the prevailing nonagricultural land uses, although scattered throughout Pitt County's planning area are many nonresidential land uses, such as auto repair shops, junkyards, and sand and gravel operations. Since the provision of sewer service is limited to municipal areas, development in the county is dependent upon septic systems. Due to poor soils and a high water table, the average residential lot is one acre in size, with areas of better soils and improved drainage suitable for one-half-acre lots. Since its formation in 1972, the Planning Board has adopted a number of "stand-alone" ordinances to regulate land subdivision, manufactured home parks, multi-family dwelling developments, billboards, and shooting ranges. In 1990, the Board of County Commissioners adopted the county's first land use plan.

The Comprehensive Land Use Plan (CLUP) set out basic planning goals, including preservation of large tracts of prime agricultural land, protection from incompatible land uses, and conservation of natural resources. In keeping with the prevailing development pattern, the plan steered growth toward municipalities

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Pitt County Zoning Ordinance Timetable

January 1990	County Board of Commissioners adopts the Comprehensive Land Use Plan.
January 1991	Planning Board begins discussion of zoning.
Fall 1991	Public meetings on preliminary zoning ordinance.
March 1992	Planning Board presents draft of zoning ordinance to the Board of County Commissioners; Open House for the public.
May 1993	First public hearing on the ordinance.
August 1993	Formation of POTPZO (Persons Opposed to the Proposed Zoning Ordinance).
October 1993	Arrival of new county manager; new zoning options.
Jan.-Apr. 1994	Planning staff update the Comprehensive Land Use Plan.
Summer-Winter 1994	Staff draft a new, "hybrid" zoning ordinance.
January 1995	County manager approves draft of the hybrid ordinance; Board of County Commissioners approve start of public review.
16 October 1995	Board of County Commissioners rejects finalized zoning ordinance.

and along major highways. Agricultural and low-density uses were recommended for outlying rural areas. To implement the plan's long-range objectives, the Planning Board recommended the development of a county-wide zoning ordinance.

Optimistic Beginnings (January 1991-Summer 1993)

Armed with the CLUP, the Planning Board officially began discussion of zoning in January 1991, and adopted a two-year time line for ordinance preparation. Over the course of the next six months, standard sections of the ordinance were drafted and presented to the board at monthly meetings. A land use inventory was begun, and by midsummer, the first draft of the code contained nine districts: three rural, four residential, one commercial, and one industrial. By late Spring 1992, Planning staff had completed background mapping of existing land uses, flood hazard areas, prime agricultural soils, and soil suitability. This information, along with the CLUP, was used to map proposed zoning districts. Throughout the summer, remaining sections of the draft text were generated for review.

Based heavily on existing regulations, the draft ordinance defined the following zoning districts and their lot-size requirements: Rural and Residential districts included Resource Conservation (5 acres), Rural Residential (2 acres), Low Density Residential (1 acre), Suburban Residential (25,000 square feet), Manufactured Home Park (25,000 square feet), and Multifamily Residential (25,000 square feet); nonresidential districts included Commercial, Business, and Institutional (25,000 square feet) and Industrial (1 acre). The ordinance also contained watershed protection and airport height overlay districts, and provisions relating to signs, parking, appeals, amendments, conditional uses, and nonconforming situations.

Public Involvement

Even before the ordinance was finished, the Planning Board scheduled a series of five public meetings for the fall of 1991 to share preliminary results. They also published the first of a series of newsletters about the zoning effort. The Planning Board publicized upcoming meetings through all the standard techniques—advertisements in all local newspapers, press releases, direct mailings to identified interest groups, flyers posted at crossroads

stores throughout the county—but, unfortunately, when the first meetings took place in November, citizen response was minimal, and two meetings were actually canceled for lack of interest. In all, about 25 people attended. Although staff expressed frustration with the lack of interest to the county manager and the Board of County Commissioners, they supported the effort to move ahead.

With the draft completed in early 1993, the Planning Board chair and staff met with the Board of County Commissioners to present the draft ordinance and a proposed public involvement schedule. Staff provided a second public newsletter and a summary fact sheet, with the intention that the Board of County Commissioners would either approve the program or redirect Planning staff if they were uncomfortable with any of the recommendations. With little comment, the Board endorsed the ordinance and citizen involvement program.

On a Saturday at the end of March, the Planning Board hosted an all-day open house to present the zoning ordinance and maps. Approximately 75 citizens attended. Only a few participants expressed major concerns, typically of a general, anti-regulation tone. From the list of participants, a special mailing list of interested citizens emerged. It was a positive meeting, and preparations were made for a Planning Board public hearing at the end of May. In the meantime, Planning staff made special presentations to several interest groups. For example, staff invited developers, surveyors, and engineers to an informal discussion with the League of Women Voters. The latter group requested stronger environmental zoning requirements, while the development community called for a weaker ordinance, with a single, half-acre zoning district applied county-wide.

The Target Starts to Move

On May 24, 1993, the Planning Board held the first public hearing on Pitt County's draft zoning ordinance. Over 100 people attended, and about 20 addressed the Board. Criticism focused primarily on the large-lot requirements of the Resource Conservation district. Other comments related to accusations of inaccurate zoning maps, the lack of farmers on the Planning Board, more regulations and the loss of private property rights, and the desire for a referendum on zoning. In response, staff recommended deleting the Resource Conservation district, and replacing it with the Rural Residential district. In effect, all proposed districts were slid outward, significantly weakening the proposal in terms of carrying out comprehensive plan policies. The Planning Board scheduled a second public hearing to collect further comments and illustrate that changes had been made. In what would turn out to be a significant event later in our zoning process, the county manager announced his retirement during this period.

A few days prior to the second hearing, the Board of County Commissioners indicated that a move toward one-acre zoning county-wide would be more acceptable to them. Too late to alter the Planning Board proposal, the hearing was held in late July, with most of the same 100 people attending. At this hearing, the two-acre district in the rural areas was now attacked, with citizens overwhelmingly favoring "one-acre zoning" instead. A number of speakers, however, noted that zoning was needed.

The following month, an opposition group, POTPZO (Persons Opposed to the Proposed Zoning Ordinance), officially launched an effort to stop county zoning. The group's primary argument was that the county needed water and sewer service, libraries, and other infrastructure and services *before* zoning. Their advertisements included biased and misleading information. For instance, they stated that land would have to be rezoned before it could be sold, and that every landowner at the last public hearing had spoken out against zoning.

The Planning Board's First Recommendation

After further review, the Planning Board made some changes and voted six-to-three to certify an ordinance to the commissioners. This version retained only one-acre and half acre residential zoning throughout the county; it was less restrictive than the public had been requesting. Of note,one member voted in opposition because he felt it was too weak and did not seek to carry out adopted plan policies, especially protection of rural character and agricultural conservation. Therefore, in an accompanying motion, the board also recommended that the County Commissioners consider revisiting the land use plan to evaluate its validity.

In September, staff went to the commissioners regarding the schedule for reviewing and adopting the recommended ordinance. Of primary concern was the fate of state-mandated provisions to regulate development in the Tar River watershed. The commissioners said they would not be ready to discuss zoning until a new county manager was selected, and directed staff to extract the watershed overlay

requirements to generate yet another separate ordinance. The Water Supply Watershed Protection Ordinance was adopted just in time to meet the state deadline of January 1, 1994.

A Major Change In Direction (Fall 1993-Spring 1994)

Several Options

In October 1993, a new county manager arrived, replete with a Master's Degree in urban planning and planning experience in several other counties. Without reviewing the situation with Planning staff, he scheduled informal discussions with the commissioners. And although he had previously told us that he would not impose his planning ideas, but instead would lend support to the effort already underway, the manager advised the Board of County Commissioners to move toward an entirely different zoning approach. He suggested a performance-based ordinance similar to that adopted in the county he had just left. This ordinance was selected in lieu of traditional zoning, and was based upon models from Kentucky and Virginia.

The primary feature of this ordinance approach was a single "open use" district, where a few uses were allowed by right, but all others were subject to a rating system and a neighborhood compatibility meeting. If sufficient points were achieved and consensus among adjoining landowners was gained, the proposed use (subject to any agreed-upon requirements) could be established. Significantly, Planning staff had rejected such an ordinance at the beginning of the project on account of the complexity and subjectivity of the point rating systems and the heavy reliance on buffering and landscaping requirements.

The details of this ordinance approach were not identified. Of course, since the commissioners were facing opposition, *anything different* sounded good to them, and most members appeared ready to accept the new proposal. Planning staff, on the other hand, were convinced that adding a few more uses and eliminating the minimum lot size requirement in the rural district or dropping back to partial county zoning could win public support.

Thus, the manager instructed staff to prepare several proposals for consideration by the Board of County Commissioners. Staff developed the following four options:

1. Partial zoning for only the most rapidly growing areas (North Carolina law allows counties to zone parts of a county provided the initial area encompasses at least 640 acres and 10 separate owners);

2. Revisions to the county-wide recommendation to reduce the minimum lot size to one-half acre;

3. A hybrid ordinance using conventional zoning for developing areas around cities and towns, and an "open-use" zone for the rural remainder; and

4. The "open-use" zone for the entire county.

By the time a joint workshop of the two boards was held in mid-November, the manager had reduced the options to only the two county-wide alternatives. At the meeting, he strongly steered the commissioners toward the "open-use" choice with glib promises like "just about any use will be allowed." Not surprisingly, they embraced the hybrid option as the new direction to pursue. Additionally, the Board of County Commissioners requested that the land use plan be updated before a new zoning ordinance of the selected variety was prepared. The next day's newspaper headline summed up the situation well: "County Back to Square One on Zoning."

The next day's newspaper headline summed up the situation well: "County Back to Square One on Zoning."

At the beginning of December, Planning staff and the manager met to discuss this new directive. The manager instructed staff to work out an aggressive, six-month timetable. It was agreed that two members of the Board of County Commissioners would be appointed as liaisons to the Planning Board to monitor the process and provide input from the legislative level. By year's end, the Planning Board had approved a new work program which would allow for updating the plan and concurrently developing a more "flexible"

zoning ordinance over the course of the next six months. It was agreed that doing both tasks simultaneously would better illustrate the relationship between planning and zoning.

At the start of 1994, Planning staff worked on the plan update, reviewing all of the adopted goals, objectives, and strategies. Four main elements emerged: County-wide Growth and Development, Land Use Compatibility, Natural Resources and Features, and Community Character. Staff prepared numerous resource maps relating to soil suitability, existing uses, thoroughfares, utilities, flood hazard areas, and demographics. They updated goal statements for each topic and grouped existing objectives under the most appropriate categories. Finally, staff presented a future land use plan map. Overall, this quick effort to revisit the CLUP did not generate any new results; it reconfirmed the overall planning direction contained in the version adopted in 1990.

By April, we were ready to present updated goals and objectives and a future land use plan map to the public right on schedule with our strict timetable. However, one Planning Board member—who happened to be facing opposition in the upcoming May election—pushed to delay the Planning Board's meeting so he could attend. Even though staff advised that the April Open House was for the Planning Board and should not be deferred, the elected officials voted to have us postpone the public meeting, ignoring our "aggressive" schedule.

Back to Zoning

Nevertheless, we turned our attention back to zoning. As a first step, representatives from two other counties were invited to describe their zoning ordinances. Not coincidentally, the manager had worked in both jurisdictions. One was the county with the performance system where he previously worked. Over the course of the next two months, staff studied the alternatives in detail, trying to blend the traditional and performance approaches into a workable package.

Around this time, the county manager began to admit to staff that he had probably done the zoning effort a "disservice" by overselling the open-use concept. He was now afraid that the Board of County Commissioners had set their sights only on this aspect. By May, he also began to question the wisdom of half-acre zoning in areas of the county with extremely poor soils. He requested special soils maps and information to use in one-on-one discussions with commissioners to try to sway their opinion. We were not surprised when, after talking to the most liberal member of the board, he gave up on the idea and admitted that we'd better forget larger lot sizes, even in those areas with known constraints.

Confrontation

The Open House for the land use update was finally held for 135 participants during an afternoon and evening in late May. Near the end of what turned out to be a positive event, a few zoning opponents angrily confronted me, with several Planning Board members coming to my defense. Among other things, we were criticized for "not listening to what they wanted" and "not doing as the Board of County Commissioners had directed." They even blamed us for the size of the prominent newspaper article that had previewed the meeting.

Following the Open House, a letter to the editor from one of the cofounders of POTPZO suggested improper reporting by the newspaper and criticized me for "having an agenda." He went on to say that his group had not acted improperly at the Open House as was reported, but was simply "asking questions" at the meeting. A week later, the two POTPZO founders appeared before the Board of County Commissioners and called for me to be fired, claiming I had said that they do not pay my salary and that I did not work for the public. Further, they argued that we were not doing what the commissioners had directed.

An outpouring of positive support for the zoning effort—and me—followed this incident. For the first time commissioners expressed support for the Planning staff, while letters to the editor were critical of the opponents' position and tactics. This incident ended when the County Manager stated in the newspaper that staff *was* doing what the Board of County Commissioners had requested, and that my job was not in jeopardy.

In Search Of An Acceptable Approach (Summer-Winter 1994)

After hearing the same negative comments repeatedly, staff still favored the partial zoning approach for several reasons. Since citizens in outlying areas said that they did not want or need zoning, what better way to show we were listening and respond to their demands than to leave them unzoned? We also felt that it would be beneficial if we gained zoning administration experience in localities that were more supportive of the idea of

land use regulations before tackling areas with known opposition. Nonetheless, the manager continued to press for his version of county-wide zoning.

Determining the best way to proceed occupied our time for most of the summer of 1994. We spent several months shuttling draft language between the planning department and the manager's office, trying to craft the "right" zoning approach for the rural portions of the county. We produced two versions which did not satisfy the manager since they did not include compatibility meetings and a rating system as used in the type of performance ordinance he favored. Finally, staff took the open use process and started to modify it to make a better fit with our situation. We also set about trying to develop a scoring system. When we informed the manager of our direction, he said that we were on a 500-mile detour that we probably shouldn't have taken. Rather than back away gracefully, we were forced to find a way to make his idea work since the commissioners were committed to it.

At last, staff produced a third recommendation for zoning the rural areas of Pitt County, which included a great deal of the open use technique, except for the point rating system. Three categories of land use were identified in the renamed Rural Open Use (ROU) district: (1) permitted by right, (2) provisional, and (3) conditional. The more intense conditional uses would go directly to the Board of County Commissioners for action at a public hearing. Provisional uses, on the other hand, would undergo an informal compatibility review with the Planning Board, with uses achieving consensus at the meeting subject to Planning Board approval. If consensus were not reached, the proposed use would follow the conditional use track for final disposition. Although he expressed some concerns, the manager agreed that this approach could be presented to the Planning Board for review and discussion.

While the Planning Board's reaction at the September 1994 meeting was rather subdued, the two commissioner liaisons favored the results. One was especially pleased, saying in the newspaper that "They're really on the right track now. They got the rural areas where there aren't any restrictions." Obviously, this was not the kind of rousing accolade we wanted! The next day, however, the manager suggested that we should prepare a "real" rural district with a one-acre minimum lot size requirement for inclusion in the text of the ordinance since the open use district "was not really our first choice." This district, he noted, was not to be mapped, but would be available upon request if landowners didn't feel that the ROU district would afford sufficient protection. We were astounded. After all of our effort to justify and rationalize the open use direction, he was now suggesting that the way we were headed might not be the best alternative.

For the reminder of 1994, an intense, but low-key, profile was assumed. Activity concentrated on rewriting and presenting various major sections of what became known as the "hybrid" ordinance to the Planning Board. To fully meet the commissioners' directive from a year earlier, the Rural Open Use district was combined with the remaining six traditional zoning districts. Staff developed a new map which represented this proposal, including about 60% of the unincorporated area in the ROU district.

Blending these two approaches into a hybrid ordinance took time, but it allowed the Planning Board members to become more familiar with the details of the code. This was purposefully done in the hope that they would develop stronger ownership of the regulations and be better able to explain and defend the draft when finally presented to the elected officials and citizens. Although no real schedule of completion was being followed (we had previously been instructed to avoid any unveiling prior to the November elections), staff hoped to conclude the drafting process early in 1995 and begin to plan for public presentations.

Presenting the Hybrid Ordinance (Winter-Summer 1995)

In early 1995, staff prepared a revised draft ordinance for presentation to the commissioners. The manager reviewed the draft in January and approved the document. As part of our strategy, the ordinance was to be presented to the Board for general concurrence *before* releasing it for public scrutiny. After its February meeting, the Planning Board extended an invitation for a joint meeting with the elected officials for the following month.

During this time, certain events started to make staff a little nervous about the potential success of the endeavor. One commissioner asked for a map to show how partial county zoning might be enacted for part of his district. The County Manager also mentioned that we should look at a "back-up" strategy for implementing zoning in limited geographic areas. He suggested that townships or fire districts might be considered. A few days later the Board of County Commissioners delayed the invitation to the joint

meeting that had been extended by the Planning Board until mid-April, noting a number of previous meetings had already been scheduled in March and that one board member was still recuperating from surgery. Worse still, the commissioner who was interested in the fall-back position of partial zoning suggested that this extra time would allow the Planning Board to prepare a report on the possibility of zoning only certain areas of the county.

Staff proceeded to finalize the draft language, and prepared a fact sheet, a "script" for the anticipated joint workshop, and final zoning maps. An assessment of the possibility of partial zoning was also prepared for discussion with the Planning Board at the next meeting. The day before the meeting, the manager mentioned that some commissioners were "really ready" for partial zoning. We had come back around to the staff's original recommendation eighteen months later! Interestingly, the Planning Board decided to stand fast with a county-wide approach since this was the charge that had been given by the commissioners over a year earlier.

We finally presented the redrafted ordinance in mid-April of 1995. The Planning Board requested authority to proceed with public review. The Board of County Commissioners overwhelmingly supported the new hybrid proposal. The two Boards agreed to schedule another joint meeting to examine the ordinance in more detail. The only blemish on the evening was that the chairman of the commissioners invited a few known zoning opponents to express their opinions. After the meeting, a couple of commissioners expressed their pleasure with the ordinance, and a newspaper editorial applauded the ordinance direction, concluding by suggesting that the opponents' position was simply not an acceptable one.

At the next joint meeting three weeks later, several commissioners came prepared with questions. Many comments expressed an attitude of opposition to government regulations, although, again, most board members noted that zoning was needed in the county. One member said he had some major reservations and needed more time to review the draft. Among other things, he questioned procedural issues and approval responsibilities, and wanted to delegate legislative authority to the staff or the Planning Board.

In addition, the Board of County Commissioners chairman asked about the partial zoning option. Planning Board members responded that they did not think partial zoning was the best approach. Finally, after two hours of questioning, the boards discussed meeting again in a week or two. One commissioner suddenly suggested the meeting be held in two months since the budget season was upon them. No one objected, so we were delayed for another 60 days. The Planning Board was discouraged that they could not begin planning for public presentations.

After the two month delay, the two boards met again in yet another discussion session. Planning Board members had developed some strategies to ensure that the program would move ahead. One idea was to vote and certify the ordinance at the meeting, which would eliminate more public meetings and would put the ordinance squarely in the commissioners' laps. After an hour of nonsubstantive questions, the Planning Board reminded the commissioners that all that was being requested was permission to take the proposed ordinance out to the general public for review and comment. Although one commissioner continued to express reservations (he represented the southern portion of the county where most of the zoning opponents lived),even saying that "we shouldn't rush into this," the Board finally agreed to allow the Planning Board to conduct public meetings.

At its regular July meeting, the Planning Board reviewed the commissioners' comments one-by-one and agreed to incorporate some of them into the draft ordinance. They also decided on a series of three public informational meetings near the end of August, aiming to be able to vote on the ordinance in

Just days before the first meeting, the opposition group. . . sent out a mailing to all property owners of 10 or more acres of land. It contained a "fact" sheet full of misinformation, exaggerations, diversionary statements, and a fill-in-the-blanks form that could be sent to County Commissioners.

September. They agreed to omit another public hearing, noting that they would only receive the same "worn out" comments from those opposed to any regulations. Additionally, the Planning Board would make special presentations to interested groups upon invitation.

Staff got to work organizing the public meetings and preparing a four-page newspaper insert that could describe the draft ordinance. As we got closer to sending the insert to the newspaper for layout and printing, the County Manager began to express concerns about using it. He questioned the cost (about $2000 to reach 20,000 households) and said that it might look like we were "promoting" zoning too much. Against staff opinion, he nixed the idea. As an alternative, we took the information and prepared another newsletter.

Just days before the first meeting, the opposition group (which had now changed its name to People Against Zoning (PAZ)) sent out a mailing to all property owners of 10 or more acres of land. It contained a "fact" sheet full of misinformation, exaggerations, diversionary statements, and a fill-in-the-blanks form that could be sent to County Commissioners. The county manager now started to talk about doing an informational campaign on cable TV to present accurate zoning information! Obviously, there was no time to mount an effective campaign.

Considering the opposition's efforts, we anticipated the worst at the three informational meetings, but they went very smoothly. A total of 100 people attended. Some arrived with their jaws set and their minds solidly closed, but throughout these meetings we still held out hope that zoning would be supported. As usual, debate focused on the philosophical. Very few comments on the actual provisions in the ordinance or the proposed zoning maps were received. We began to wonder if we had a chance to succeed with zoning this time.

During this stage, however, several commissioners started to publicly express their position on zoning. The common theme was that they personally supported zoning and thought it was needed, but many of their constituents were writing and calling in opposition. We assumed that their political aspirations would outweigh anything else, and would dictate that they would vote against zoning in accordance with "citizens' wishes" rather than follow their own instincts.

A Final Decision (Fall 1995)

More than two years after transmitting its first zoning recommendation, the Planning Board unanimously certified the revised, county-wide zoning ordinance to the Board of County Commissioners for consideration. Prior to the official action, they reviewed and agreed to incorporate a number of minor text changes that were suggested by citizens and special interests during the public information meetings. An accompanying motion recommended that the Board of County Commissioners adopt the changes to the Comprehensive Land Use Plan. Thus, Pitt County's first zoning ordinance was back in the hands of the elected officials.

Finally, a presentation was scheduled for the Monday, October 16, 1995 meeting of the Board of County Commissioners. The previous week, the county manager advised staff that a major presentation would not be needed and to save it for the Board's public hearing. Over the weekend before the meeting, the *Daily Reflector* ran a series of articles, with one story on Saturday and several on Sunday. Most of the first section of the paper was devoted to the topic. This excellent set of stories laid out the complexity of the issue in an informative, unbiased manner.

With optimism, we appeared before the commissioners to formally present the certified ordinance and update to the land use plan, and asked the Board to schedule a hearing. In a matter of minutes, the commissioners pulled the plug on the first attempt at county-wide zoning in Pitt County. First, the commissioner who had delayed efforts on previous occasions spoke, saying, among other things, that people should be allowed to vote on the issue and that regulations may start out at an acceptable level but soon get out of hand. He concluded by saying that zoning just did not have the support of the general public.

Then, after accepting the report and applauding staff and Planning Board work in producing a "user-friendly" ordinance, another commissioner made the motion not to proceed with a public hearing. He did note, however, that the motion was not intended to preclude the possibility of a future referendum on the issue or areas of the county volunteering for partial zoning. With no further discussion, the commissioners voted six to one not to go forward.

Conclusions and Analysis

After nearly five years of work, we finally had an answer. Given our roller coaster ride of delays and setbacks, we were not at all surprised by the outcome. This Board of County Commissioners had never truly embraced the idea of zoning. Historically the Board had avoided comprehensive land-use regulations for the county favoring instead ad hoc measures. This same attitude prevailed even during our five-year effort. At one point there arose a move to regulate shooting ranges in the county and at another a town requested permission to extend its extraterritorial jurisdiction. The Board could have used either issue to spotlight the value of county-wide zoning, but instead, in both cases, the Board specifically chose to avoid a zoning route. The continual changes of direction were perhaps another symptom of the overall lack of commitment to zoning on the part of the Board of County Commissioners. However, the situation was further confused by the arrival of the new county manager who had a predetermined course of action. We were especially frustrated that two years of conflict and controversy might have been avoided if he had not insisted on having his mark on the outcome.

Nevertheless, we enjoyed a certain amount of success. The whole process raised awareness of planning and zoning in the county. The Planning staff produced an innovative, workable zoning ordinance geared to a county with a mix of rural and suburban development. Finally, there was some comfort in simply knowing that the staff and Planning Board had persevered on this major undertaking. Furthermore, we learned some very important lessons about planning and politics. Here are some observations that might prove useful in other initial efforts:

1. **Establish early consensus on your planning direction.** Devise a way to discuss broad ordinance ideas and issues before writing a complete code. If at all possible, obtain a *real* commitment from elected officials from the beginning. Unfortunately, people tend to hold back true feelings until a lot of effort has been expended in producing a final plan. At that point, many will decide they would like to back up and talk philosophy.

2. **Define responsibility.** On too many occasions, our Board of County Commissioners usurped Planning Board authority. The Planning Board ought to be able to conduct its work and make its recommendations without having to obtain permission from the elected body at every step of the way. The responsibility and authority of each board should be spelled out and understood before problems develop.

3. **Communicate.** Establish and maintain continuous dialogue between staff, citizens, and elected officials. If you use liaisons—and we would encourage them—make sure they are required to report activities back to their counterparts. Ensure that copies of written comments sent to elected officials from the general public are shared with staff and appointed officials so everyone can be given the benefit of this information.

4. **Engage the public.** Do everything possible to involve, inform, and educate the public. Consider the use of a citizen's committee to get "buy in" from those who might oppose your effort. Use nontraditional means to get the word out. But realize that no matter what you say or do, some people will never agree.

5. **Exploit the Media.** Use the mass media to reach those citizens not actively involved in planning issues. You can be sure that your opposition will.

6. **Respond to criticism.** Find a professional, effective way to publicly respond to criticism, misleading information, or personal attacks. We often wondered if not actively defending ourselves caused other people to think that critics were correct in their accusations.

7. **Capitalize on opportunities.** Be smart and strategic in your approaches to the project. We lost too many chances to convince people of the need for zoning. Of course, if the elected officials had truly been committed to zoning, we might have been able to use one of those situations to our advantage. Furthermore, if a project demonstrates little chance of success at a given point in time, find others to work on while you wait for a precipitating event.

8. **Don't take things personally.** Finally, develop a thick skin, a sense of humor, and a hobby or sport that burns a lot of energy. There's more to life than planning and zoning. CP

Planning and Local Government Law Update

Maupin, Taylor, Ellis & Adams, P.A.

Editor's note: This article is compiled from material published by Maupin, Taylor, Ellis & Adams, P.A.

Court Finds No Review Possible on Denial of Special Use Permit

In this case, the plaintiffs applied to the Town of Weaverville for a special use permit in order to open a bed and breakfast guest inn. Ballas v. Town of Weaverville, 121 N.C. App. 346 (1996). The Town's Board of Adjustment, which considers these permit applications, denied the permit because the plans did not meet specific design criteria. The plaintiffs appealed to the trial court, which affirmed the Board's decision and held that the plaintiffs had not produced sufficient evidence to show compliance with the Town's zoning ordinance. The Court of Appeals reversed the trial court's decision and remanded the case for entry of a new decision with further findings of fact.

One section of the ordinance required the plaintiffs to show that the special use permit would not substantially diminish and impair neighborhood property values. Testimony of a real estate appraiser showed that a bed and breakfast would lower surrounding property values by 11% to 23%. The court found that such evidence could support a finding that the bed and breakfast would substantially diminish property values, but it did not mandate such a finding.

Another section required a showing that adequate utilities and necessary facilities would be provided. Although the plaintiffs showed that they had installed public water and sewer lines, the Town had not yet accepted the utilities for maintenance. The court found that such evidence is not sufficient to support a finding that the utilities were inadequate.

Because the lower court's decision had not specified that the denial was based on impaired property values, the court could not review the validity of the Board of Adjustment's decision, and so remanded the case to Superior Court for further consideration. The case highlights the requirement that a Board of Adjustment or other decision-maker make explicit findings in regards to a zoning permit decision, and it should serve to remind landowners of the need to closely read the local zoning ordinance and comply with all of its terms.

First Town in the U.S. Sued by the Justice Department for Antitrust Violations

Stilwell, Oklahoma, population 2,700, recently became the first municipality ever to be sued by the federal government for antitrust violations. The Justice Department sued Stilwell for using its monopoly power over water and sewer to force purchase of its electricity, which is against the law. The Justice Department is currently investigating other cities and towns across the nation for similar violations.

When a developer built a new apartment complex in Stilwell, he planned to buy electricity from an out-of-town utility offering a better deal than the town. However, Stilwell threatened to deny him water and sewer service unless he bought its electric service, so

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he changed his mind.

Apparently, this practice of using one municipal service to force purchase of another service, and thereby keeping competitors out, is not so uncommon among municipalities; the Justice Department wants to send a clear signal to other violators.

Sparsely populated areas often receive electricity service from rural co-ops, which are member-owned utilities first authorized by Congress in 1936 to serve such areas. As municipalities expand, these co-ops are clashing with towns and cities competing for business. In Stilwell's case, the town first attempted to buy the local co-op's power lines, but it would not sell. Stilwell then sued the co-op, asserting that state law allows it to claim power lines within city limits. This case is pending in federal court.

An editorial written in a local newspaper first brought up the possibility of antitrust violations by Stilwell. When the editorial was faxed to the Justice Department, the investigation began. Despite a recision of the utility policy by the Stilwell City Council, the Justice Department ordered the town to make compliance reports for the next ten years.

This case not only sends a message to cities and towns who engage in these types of activities, but it also provides developers and other landowners with options when faced with similar situations.

Statutes Protecting a Developer's Opportunity to Develop Property

Several states, including North Carolina, have recently enacted development agreement statutes. These statutes could prevent severe disappointment on the part of developers. See Daniel J. Curtin, Jr. and Scott A. Edelstein, *Development Practice in California and Other States*, 22 Stetson L. Rev. 761 (1993); reprinted in 1994 Zoning and Planning Handbook 491 (Kenneth H. Young, ed., Clark Boardman Callaghan).

Developers spend considerable amounts of time preparing for approvals. After going though all the necessary steps of the land use permitting process, including financial feasibility reports, environmental studies and hearings, they can receive "final" approval which turns out to be less than final.

Subsequent legislative action, in the form of rezonings, moratoriums or voter-approved initiatives, can destroy the approval. This can occur if the developer does not have a vested right to proceed with the project.

North Carolina has two statutes which provide stability for private developers. N.C. Gen. Stat. §§ 160A-385—160A-385.1 (1994). Changes in zoning will not effect the plans of a developer if valid approval or a building permit was obtained prior to the changes or if a vested right was established. Approval of a site specific plan or a phased development plan will result in a vested right running for two to five years. Accordingly, a developer can proceed with the approved plan despite any subsequent zoning changes. This is subject to a few exceptions and leaves open the question of when a right vests if no building permit has yet been granted.

With these laws, North Carolina has attempted to strike a balance between the public's interest in zoning and the private expectations of developers. Such legislation provides a useful planning device for both developers and the government.

Court Upholds a Town's Right to Provide Water Service in Competition with a Private Company

The North Carolina Court of Appeals recently upheld the right of a town to provide water service in competition with a private company in Carolina Water Service v. Town of Atlantic Beach, 121 N.C. App. 23 (1995). The plaintiff utility had claimed tortious interference with contract, unfair trade practices, and equitable estoppel, which are all claims alleging unfair behavior on the part of the town.

Prior to the Town's annexation of certain areas in 1987 and 1988, Carolina Water had provided water service to these areas which was equal to that offered by the Town to its customers. Because the services were comparable, the Town did not extend water service at that time. Subsequently, the Town added fluoride and water softener to its water, but Carolina Water did not provide these additives. Upon a request by landowners in 1992 to extend water to the areas, the Town voted to extend services in the same manner as to any newly annexed area, which included waiving the impact fee and offering a reduced tap-on fee. The result was that the Town extended lines parallel to Carolina Water's lines, and numerous people switched over to the Town's service.

Although Carolina Water alleged that the Town had tortiously interfered with its contracts and committed unfair trade practices, the court found that the Town is authorized by law to construct its own utilities to compete with private companies. Further, the Town had not encouraged citizens to terminate their contracts with Carolina Water, but rather had

offered a competing product which was different because of the water additives. Therefore, the court found that Carolina Water did not have a claim because the Town's actions were neither unfair nor deceptive, and the Town had established its own water service lawfully.

This case demonstrates that municipalities are free to compete with private businesses in the provision of public services and can succeed in the competition if they offer a superior product.

County Held Responsible for the Taking of a Driveway Easement

The North Carolina Court of Appeals recently held that a county was responsible for the taking of an easement, despite the fact that government regulations forced the taking. Tolbert v. County of Caldwell, 121 N.C. App. 653 (1996).

Caldwell County operates a landfill adjacent to the plaintiffs' property. In 1980, the County and the plaintiffs' predecessor in title made an agreement, which created a sixty-foot easement across the landfill for his use and the use of his heirs and assigns. The easement would be opened to the public when the County ceased operation of the landfill or in ten years, whichever occurred first. A state agency later promulgated regulations mandating that landfill operators control public access. Following these regulations, Caldwell County limited the plaintiffs' access to the easement by installing gates and fences and by allowing the plaintiffs to use the easement only during the landfill's operational hours (8:00 a.m. to 5:00 p.m. weekdays and a few hours on Saturdays).

The County admitted that the action was a temporary taking but denied that it was the responsible party because state and federal regulations had forced it to restrict access to the landfill. The court rejected this argument and held that Caldwell was the party responsible for the taking. The court stated that the County was the party that had taken or condemned the easement because it operated the facility, executed the agreement with the plaintiffs' predecessor, and closed the road. As an aside, the court ordered the County to pay damages and costs, but it did not specifically rule on whether the County could look to state and federal agencies to help pay these damages and costs.

Although this case places counties in an awkward position between complying with state and federal regulations and takings claims by landowners, it is positive for landowners and their ability to find relief for the loss of their property rights.

Court Finds That City Satisfies the "Public Benefit" Test

In a decision that may have great ramifications for land condemnation law, the North Carolina Court of Appeals recently upheld a trial court's decision to deny plaintiffs' claims for injunctive relief to prevent the condemnation of their land. Stout v. City of Durham, 121 N.C. App. 726 (1996). The City of Durham intended to condemn portions of the plaintiffs' properties for construction of a sewer outfall pursuant to its power of eminent domain.

Plaintiffs claimed that the move was an unlawful and unconstitutional exercise of the City's power to condemn property because the proposed sewer outfall would primarily benefit the private developer of a shopping center. They contended that the condemnation was improper because it was for a private, rather than a public purpose. City governments have no authority to condemn or take property for a private purpose. Any attempt by city government to do so would be void.

In a decision that may have great ramifications for land condemnation law. . . .

To stop the condemnation, plaintiffs had to establish that the City's condemnation was for a private purpose. The Court of Appeals found that they had failed to do so.

The court stated that the sewer outfall would contribute to the welfare and prosperity of the entire community, and also benefit others in the area, who would have an equal right to connect to the system. Thus, this public purpose and benefit outweighed any incidental benefit to the private developer, and the court concluded that the City had met the "public benefit" test.

This case highlights municipalities' broad power of eminent domain and the generous reading of the "public benefit" test given by the courts. As long as citizens have equal rights to use an improvement, the benefits to private individual entities may be deemed incidental and the condemnation found valid. CP

Masters Projects

The following is a list of Masters Projects prepared by students who graduated from the Depratment of City and Regional Planning at UNC-Chapel Hill in 1996. To obtain a copy of one or more of these projects please contact Patricia Coke at (919) 962-4784 or coke.dcrp@mhs.unc.edu.

Assessing the Impact of Transportation Improvements on Wetlands in North Carolina Using GIS. **Daniel Linton Baechtold.**

Guiding Growth in Wetern North Carolina: An Idea for Coordinating Land Use Planning, Scenic Assessment and Eco-Tourism Development. **Mark Randall Barker.**

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Northampton County, Virginia: Community Empowerment, Government Programs, and Non-Profit Interests Unite to Formulate a Sustainable Development Action Strategy. **Karl Frederick Fulmer.**

The Columbia River Gorge National Scenic Area: Resource Protection in the Rowena Special Management Area. **Anne Elizabeth Giordano.**

Multiple Property Documentation and Nominations to the National Register of Historic Places for the Meriwether Lewis and William Clark Sculpture, the Thomas Jonathan Jackson Sculpture, the Robert Edward Lee Sculpture, the George Rogers Clark Sculpture—All in Charlottesville, Virginia. **Betsy Gohdes-Baten.**

The Role of Retail Development in Revitalizing Downtown Raleigh, North Carolina. **Paul A. Grygiel.**

Assessment of Water Quality Impacts Using an Integrated Land Use—Transportation Approach: A case Study of the Northern Wake Expressway. **Thomas K. Harrington.**

Impacts of Recent Development in Northeast Chatham County, North Carolina. **Mark A. Healey.**

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Elements of Community in the American Residential Landscape. **Karen L. Kristiansson.**

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Carrying Capacity Study. **Tina Louise Murphrey.**

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